Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

DOROTHEA A. ARCURI, et al.,

Petitioners,

v.

LOCAL 54 OF THE HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION, (H.E.R.E.I.U.), et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, for purposes of determining whether an award of attorneys fees, pursuant to the common benefit exception to the American Rule is appropriate, a district court's determination that a prevailing plaintiff's litigation efforts against an organization such as a union, has conferred a substantial benefit on the organization's membership, is a finding of fact subject to the "clearly erroneous" standard of review?

2. Whether the policies advanced, and rights conferred, by the duty of fair representation, are so vital to the Federal labor scheme that a prevailing plaintiff, who vindicates his or her own rights to fair representation, as a matter of law, confers a substantial benefit on the union's membership?

3. Whether a union member who succeeds in a duty of fair representation suit, enjoining a union, from reopening a final and binding arbitration award, when the union had no legitimate factual or legal basis to seek to reopen the award, and was acting for purely political reasons to appease a group of competing union members who were adversely affected by the award, confers a substantial benefit on the union membership as a whole by vindicating important incorporeal rights to fair representation and by providing the union with a lesson to guide the union's future conduct?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The names of all parties to the proceedings in the United States Court of Appeals for the Third Circuit are as follows: Dorothea A. Arcuri; Patricia Brooks; Victoria Bryant; Karen Carlini; Robert Donovan; Philip K. Ferguson; Nancy Guerrera; Robert Hingos; Lee A. Kinsell; Charles McBride; June McBride; Rosalie McCarthy; Michele McCartney; Janet M. Medio; Linda Meranus; Gregory Natale; Marianne K. Ortzman; Ronald Pagano; Anna Marie Platania; Geri Shannon; Donald Silano; Jeanette Sopuch; Kenneth W. Strain; Trasena Tuso; Elizabeth Walker; Victoria Weger; Richard Zak; Joanne Capetola; John Lascowski; Adrienne M. Palermo; Mary Ann Peterson; Susan Petrone and Barry L. Wright; and, Local 54 of the Hotel Employees and Restaurant Employees International Union.

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PETITION FOR WRIT OF CERTIORARI

Dorothea Arcuri, et al., the plaintiffs below and the petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on February 18, 1998.

OPINIONS BELOW

The February 18, 1998 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at *Polonski v. Trump Taj Mahal Associates*, 137 F.3d 139 (3d Cir. 1998) and is reprinted in the separate appendix to this petition, app. 1-19. The prior opinion of the United States District Court for the District of New Jersey entered August 1, 1995 is unreported and is reprinted in the separate appendix to this petition, app. 37-52.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered by order dated February 18, 1998. The petitioner's petition for rehearing and suggestion of rehearing in banc, was denied by order dated March 16, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

Fed.R.Civ.P. 52(a).

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the

facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

Relevant Procedural History

The Petitioners, a group of cocktail servers employed by the Trump Taj Mahal Associates ("the Taj") at the Trump Taj Mahal casino in Atlantic City, New Jersey, commenced this action by the filing of a complaint on August 7, 1991. The complaint was filed, pursuant to 29 U.S.C. § 185, against both the Petitioners' employer, the Taj, and their union, Local 54 of the Hotel Employees and Restaurant Employees International Union ("Local 54" or "the Union"). Among the claims asserted in the complaint was a request, based on the Union's breach of the duty of fair representation, to enjoin the Union's attempts to reopen a final and binding arbitration award that the Union had previously obtained, sustaining the plaintiffs'

grievance over seniority rights, against the Taj. On August 8, 1991, the district court, per the Honorable Stanley S. Brotman ("the district court") issued a temporary restraining order enjoining the Union's attempt to reopen the award. Preliminary injunction hearings commenced on August 22, 1991, and after one day of hearings, the Union conceded on the record that it would not undertake any further efforts to reopen the award.

Both parties eventually filed cross-motions for summary judgment. On September 30, 1994, the district court entered an order which, in part, granted summary judgment in favor of the plaintiffs against the Union. In the September 30, 1994 order, the district court determined that the Union had breached the duty of fair representation in that it "acted improperly and arbitrarily when it attempted to reopen the arbitration award". As damages, the district court ordered the Union to reimburse the plaintiffs for reasonable attorneys fees and costs incurred as a result of their efforts to enjoin the Union's improper attempt to reopen the award.

At the Union's request, the district court reconsidered its award of counsel fees as damages for the Union's illegal conduct. On August 1, 1995, the district court entered an order rescinding the award of attorneys fees as damages. In the August 1, 1995 award, however, the district court went on to award the plaintiffs counsel fees under the "common benefit" exception to the American Rule on attorneys fees. On September 27, 1996, after further proceedings, the district court entered an order determining that the amount of counsel fees and costs awarded to the plaintiffs was $100,582.00 and $2,984.30, respectively.

On May 10, 1996, the Union filed a notice of appeal from the decisions and orders of the district court dated September 30, 1994 and August 1, 1995 relating to the district court's summary judgment determination. On May 23, 1997, the United States Court of Appeals for the Third Circuit dismissed the above-mentioned appeal as untimely.

On October 4, 1996, the Union filed an appeal from the district court's order dated September 27, 1996 relating to attorneys fees. By opinion filed February 18, 1998, the United States Court of Appeals for the Third Circuit reversed the district court. Judgment was entered that same day. By order dated March 16, 1998, the United States Court of Appeals denied the plaintiffs' petition for rehearing and suggestion for rehearing in banc.

Relevant Factual Background

During the years of 1989 and 1990, Local 54 represented the food and beverage employees at three casino properties in Atlantic City, New Jersey: the Trump Plaza ("Plaza"), Trump Castle ("Castle") and Trump Regency (formerly the Playboy Hotel and Casino) ("Regency") (collectively "Trump"). On February 9, 1990, Local 54 and Trump representatives signed a transfer agreement which adopted the terms of the collective bargaining agreement between Local 54 and the Plaza, and provided that upon the opening of a new property, the Trump Taj Mahal, former employees of the Plaza, Castle and Regency would be granted the highest seniority numbers upon their transfer to the Taj Mahal. Upon its April 2, 1990 opening, the Taj Mahal failed to recognize the seniority status of employees transferred from the Regency. As a result, on April 10, 1990, Local 54 filed a grievance on

behalf of the former Regency employees (who are the plaintiffs in this case). This matter was submitted to final and binding arbitration.

The arbitration was held on September 6, 1990. At the arbitration, both the Union and the Taj were represented by counsel and both sides were given ample opportunities to present evidence and to cross-examine witnesses. On December 8, 1990, the arbitrator issued an award sustaining the grievance and directing the Taj to "establish seniority status for the former Regency employees" ("the award"). On February 1, 1991, the Taj announced that it would implement the award. In a letter to its beverage department employees, the Taj promised to immediately publish the seniority lists and to hold a job rebid five days later.

On or about January 1, 1991, new leadership was installed at the Union. The new Union leadership was confronted by several dozen Taj Mahal cocktail servers whose seniority numbers were adversely affected by the award. These employees complained that they were not invited to attend the arbitration, complained, without being able to offer any specifics, that the Union's president had allegedly testified falsely at the arbitration, and complained, again without specifics, that a witness who allegedly possessed relevant information was not called to appear at the arbitration hearing. Without conducting any review or investigation into the bald, unsubstantiated allegations of wrongdoing, solely to appease the group of competing members, the Union unilaterally decided to reopen the plaintiffs' final and binding arbitration award and to resubmit the entire matter back to the arbitrator for his reconsideration. On July 11, 1991, Local 54 went one step further. On that date, Local 54 actually requested

the Taj to defer scheduling a job rebid until the arbitrator reconsidered his award. In a job rebid, all of the food and beverage department jobs and shifts are listed for rebid according to seniority number. The job rebid was the only method by which the plaintiffs could fully implement their seniority rights.

The plaintiffs were concerned about the Union's conduct. Seniority for cocktail servers is extremely important in that it determines, among other things, shifts, vacations and floor location. The difference in tips between certain shifts and certain floor locations can be substantial. The rights awarded to the plaintiffs by virtue of the arbitration were very valuable. By attempting to reopen the award, the Union was exposing the plaintiffs to the risk that the arbitrator would reconsider thereby totally negating those previously recognized rights. After several unsuccessful attempts to persuade the Union not to reopen the Award, on August 7, 1991, the plaintiffs filed the present action in the United States District Court for the District of New Jersey against the Taj, and against the Union for breach of the duty of fair representation.[1]

Among the plaintiffs' claims was a claim that the Union was breaching the duty of fair representation that it owed to the plaintiffs by unilaterally attempting to reopen a final and binding arbitration award for no legitimate reason. On August 8, 1991, the district court enjoined Local 54's attempts to reopen the award. Summary judgment was entered in favor of the plaintiffs by order dated September 30, 1994. The district court granted summary judgment in favor of the plaintiffs

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[1] Jurisdiction in the district court was based on 29 U.S.C. § 185.

because it determined that Local 54's attempt to reopen the Award was motivated solely by a desire to appease the competing cocktail servers and hence lacked any rational legal or factual basis. The district court determined that the Union's conduct which threatened the plaintiffs' rights in the award was, therefore, arbitrary, perfunctory and improper.

By order and opinion dated August 1, 1995 the district court determined that the plaintiffs were entitled to counsel fees pursuant to the "common benefit" exception to the American Rule. The district court, after presiding over this litigation for four (4) years, including a hearing for a temporary restraining order, a hearing for a preliminary injunction and numerous conferences, determined that the plaintiffs' vindication of their rights to fair representation provided Local 54 membership with a general vindication of the members' rights, and provided Local 54 with a "generalized lesson" that should guide Local 54 in its future conduct. See, the August 1, 1995 Opinion, p. 11. The district court determined that the "generalized lesson" was, that the Union should not jeopardize rights achieved on behalf of one class of members solely to appease a competing class of members, absent a sufficient factual or legal basis. See, the August 1, 1995 Opinion, pp. 11-12. The district court found that such a lesson was particularly appropriate in this case because of Local 54's unyielding refusal throughout the litigation to acknowledge its mistake.[2] By subsequent order dated September

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[2] At every stage of this proceeding, injunction, summary judgment, attorneys fees, indeed even during the instant appeal, Local 54 has steadfastly refused to acknowledge that its attempt to unilaterally reopen the award solely to appease the disgruntled cocktail servers, was illegal.

27, 1996, the district court awarded the plaintiffs counsel fees of $100,582.00 and costs of $2,984.30.[3]

Local 54 filed an appeal from the attorneys fee award on October 4, 1996. Oral argument on the appeal was held before a panel consisting of Circuit Judges Greenberg, Roth and Seitz. By order entered February 18, 1998, the Panel reversed the district court's September 27, 1996 order on the basis that the Panel disagreed with the district court's determination that the plaintiffs' litigation provided a substantial benefit to Local 54's membership as a whole.

The panel agreed with the district court's determination that Local 54 breached the duty of fair representation when it unilaterally attempted to reopen a final and binding arbitration award sustaining a seniority grievance in favor of one group of members without any legal or factual basis, solely to appease a contingent of adversely affected members. The opinion of the Court, p. 13. The panel also agreed with the district court's determination that the plaintiffs' litigation conferred a substantial benefit on the plaintiffs. The panel disagreed with the district court's determination that the litigation,

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[3] The plaintiffs' fee request was for $173,710.00. This requested amount had already been reduced by the plaintiffs' counsel, as a matter of counsel's independent billing judgment. Fees in this case actually exceeded $200,000.00. This litigation, at that time, had been very contested and had spanned close to five (5) years, with countless motions, depositions and thousands of interrogatories. Local 54, very early in this case, implemented a scorched earth litigation strategy and steadfastly refused to offer even one-dollar ($1) to settle. Local 54's counsel stated that Local 54's settlement strategy was intended to discourage other members from bringing similar suits.

which vindicated the plaintiffs' rights to fair representation, conferred a "substantial benefit" on the Union. *Id.* The panel offered no concrete explanation for its conclusion other than the following:

> The record cannot fairly support a legal conclusion that the Union's attempt to reopen arbitration was a practice that threatened "the enjoyment or protection of an essential right" to the entire Union's interest. . . . Nor can we see how fee shifting in the present case would establish a policy that would "encourage unions to more zealously represent employees' interests." . . .

Id. (citations omitted).

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted to Resolve a Conflict Among the Lower Courts Regarding the Standard of Review to Be Applied to a District Court's Determination That a Prevailing Plaintiffs' Litigation Efforts Conferred a Substantial Benefit on an Ascertainable Class

The prevailing "American Rule" provides that each party to litigation be responsible for their own counsel fees. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 389 (1969). However, under the exercise of its equitable powers, a federal court may award fees under the "common benefit" exception to the American Rule. This exception permits a prevailing party to obtain reimbursement of attorneys fees in cases where:

> i) the litigation has conferred a substantial benefit on the members of an ascertainable class; and
> ii) where the court's jurisdiction over the subject matter of the suit makes it possible to spread the

> costs proportionately among the members of the class.

Mills v. Electric Auto-Lite Co., supra, at 393-394.

It has generally been recognized that the determination of whether a party deserves a fee award in a common benefit case is a fact specific question. E.g., *Rodonich v. Senshyn*, 52 F.3d 28, 33 (2d Cir. 1995). As long as the district court applies the correct legal standard, whether to award fees has generally been reviewed solely for an abuse of discretion. E.g., *Perry v. O'Donnell*, 759 F.2d 702, 704 (9th Cir. 1985); *Cruz v. Local Union No. 3, International Brotherhood of Electrical Workers*, 34 F.3d 1148, 1159 (2d Cir. 1994); *Price v. Seydel*, 961 F.2d 1470, 1475 (9th Cir. 1992); *Rodonich*, supra, at 33; *Marshall v. United States Steelworkers of America*, 666 F.2d 845, 849-850 (3d Cir. 1981), cert. den. by 459 U.S. 823 (1982); and *Pawlack v. Greenwalt*, 713 F.2d 972, 977-978 (3d Cir. 1983), cert. den. by 464 U.S. 1042 (1984). And the rule quite clearly is that findings of fact are not to be set aside unless "clearly erroneous". Fed.R.Civ.P. 52(a).

More specifically, with respect to a district court's determination of whether the litigation has conferred a substantial benefit on members of a class, the circuits that have considered the issue heretofore have considered the issue a factual determination and have, accordingly, limited their review to the "clearly erroneous" standard. *O'Neil v. Church's Fried Chicken*, 910 F.2d 263, 265 (5th Cir. 1990); *Southerland v. International Longshoremen's and Warehousemen's Union, Local 8*, 845 F.2d 796, 799 (9th Cir. 1987); *Lewis v. Chiles*, 719 F.2d 1044, 1050 (9th Cir. 1983); and *Ramey v. Cincinnati Enquirer*, 508 F.2d 1188, 1194 (6th Cir. 1994) cert. den. by 422 U.S. 1048 (1975) (relying on Fed.R.Civ.P. 52(a)). For example, in *O'Neil v. Church's*

Fried Chicken, Inc., the district court awarded shareholders who pursued a derivative suit against the corporation, attorneys fees under the principle that their actions conferred a substantial benefit on the corporation. *O'Neil*, supra, at 265. On appeal, the fifth circuit refused to reverse because it was unable to conclude that the district court's finding on that matter was clearly erroneous. *Id.* at 267.

In *Lewis v. Chiles*, supra, a shareholder in a derivative suit asked for and was denied attorneys fees under the common benefit exception to the American Rule. The district court determined that the derivative suit conferred no benefit on the corporation. *Lewis*, supra, at 1049-1050. The ninth circuit refused to reverse that determination because it could not conclude that the district court's determination that the suit conferred no benefit on the corporation was clearly erroneous.

Finally, in *Ramey v. The Cincinnati Enquirer, Inc.*, shareholders in a derivative action were awarded attorneys fees by the district court. On appeal, the sixth circuit was presented the issue of whether the litigation produced such a benefit for the corporation as to justify the award of fees. On the basis of the Rule 52(a), the sixth circuit concluded that the record could not support the conclusion that the district court's determination, that the litigation resulted in a substantial benefit to the company, was clearly erroneous. *Id.* at 1194.

In the present matter, the district court's award of counsel fees was reversed because the third circuit simply disagreed with the determination that the Union's membership "derived a substantial benefit" from the litigation. *Polonski*, supra, at 147. In reaching its conclusion, the

third circuit stated that it was reviewing that determination pursuant to a "plenary standard". *Id.* at 142. The third circuit also twice labeled the district court's determination of whether the litigation conferred a substantial benefit on Union membership as a "legal conclusion" thereby paving the way for the application of the plenary standard. *Id.* at pp. 147 & 148. The third circuit, therefore, was presented with exactly the same issue that was presented to the fifth, sixth and ninth circuits and reviewed it pursuant to a different legal standard.

The third circuit's application of the "plenary" standard of review, as opposed to the "clearly erroneous" standard of review, had a severe prejudicial impact on the plaintiffs' rights in this case. Questions reviewed under a "clearly erroneous" standard are reversed only when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960). Under the less rigorous "plenary" review standard, a district court's determination may be reversed if the appellate court merely disagrees. See, 5 J. Moore, *Moore's Federal Practice* ¶ 52.03[2] (2d ed. 1966). The likelihood of affirmance is thus a function of the standard of review. History reveals that appellate courts seldom reverse under the clearly erroneous standard. Calleros, C., *Title VII and Rule 52(a): Standards of Appellate Review in Disparate Treatment Cases – Limiting the Reach of Pullman Standard v. Swint*, 58 Tul.L.Rev. 403, 403-404 (1983). Appellate courts pay far greater deference to a finding of fact than to a legal conclusion. Weiner, S., *The Civil Nonjury Trial and the Law-Fact Distinction*, 55 Cal.L.Rev. 1020,

1021 (1967). The application of the plenary review standard, therefore, in and of itself, lessened the plaintiffs' likelihood of success on the Union's appeal.

There was also certainly enough evidence in this case to support the district court's determination and to affirm if the "clearly erroneous" standard had been applied. The district court, upon a review of the evidence, after presiding over the matter for four years, determined that the Union's leadership did not fully appreciate the Union's obligation of fair representation especially as it applied to final and binding arbitration awards in favor of its members. The district court determined that the Union had acted arbitrarily, in a perfunctory fashion, and without legal or factual basis, when it attempted to reopen the award that sustained the plaintiffs' grievance. Impressed by, among other things, the Union's recalcitrance, the district court, in the exercise of its discretion, determined, in accordance with well accepted legal principles, that the plaintiffs' action to enforce their rights to fair representation conferred an intangible substantial benefit on the entire Union membership in that the plaintiffs vindicated and strengthened important rights of union governance and provided guidance for future conduct. When applied to the facts of this case, therefore, the application of the correct, "clearly erroneous", standard of review would have resulted in an affirmance of the district court's ruling, not a reversal.

The standard of review in fee application cases has also become an important matter. First, litigation involving exceptions to the American Rule is abounding. In the last five years (1993 through to the present), there have been nearly one hundred decisions reported by the district courts involving the exceptions to the American Rule

on attorneys fees.[4] The standard of review in such matters will therefore continue to dog the federal judiciary.

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[4] *In re Copley Pharmaceutical, Inc.*, ___ F.Supp. ___, 1998 WL 217942 (D.Wyo., 1998); *Jaisan, Inc. v. Sullivan*, ___ F.R.D. ___, 1998 WL 139740 (S.D.N.Y., 1998); *Employee Staffing of America, Inc. v. William H. Mercer, Inc.*, 1998 WL 118166 (S.D.N.Y., 1998); *Matter of D.N.H. Towing Co., Inc.*, 1998 WL 51835 (E.D.La., 1998); *Mullis v. Universal Select, Inc.*, 1997 WL 827409 (M.D. Fla., 1997); *Arc of New Jersey, Inc. v. Township of Voorhees*, 986 F.Supp. 261 (D.N.J., 1997); *Shepard v. Apfel*, 981 F.Supp. 1188 (S.D. Iowa, 1997); *General Ins. Co. of America v. K. Capolino Const. Corp.*, 983 F.Supp. 403 (S.D.N.Y., 1997); *In re Pro-Snax Distributors, Inc.*, 212 B.R. 834 (N.D. Tex., 1997); *In re Keaton*, 212 B.R. 587 (E.D. Tenn., 1997); *Allen v. Lloyd's of London*, 975 F.Supp. 802 (E.D. Va., 1997); *Dystar Corp. v. Canto*, ___ F.Supp. ___, 1997 WL 875606 (D.Mass., 1997); *In re Southern Ohio Correctional Facility*, 175 F.R.D. 270 (S.D. Ohio, 1997); *U.S. v. Ogamba*, 1997 WL 414193 (N.D.Cal., 1997); *Matter of Arbitration Between Trans Chemical Ltd. and China Nat. Machinery Import and Export Corp.*, 978 F.Supp. 266 (S.D.Tex., 1997); *Bensen v. American Ultramar, Ltd.*, 1997 WL 317343 (S.D.N.Y., 1997); *Dorr-Oliver, Inc. v. Fluid Quip, Inc.*, 966 F.Supp. 718 (N.D. Ill., 1997); *Landstar Inway, Inc. v. U.S.*, 1997 WL 335803 (D.D.C., 1997); *U.S. v. Eleven Vehicles*, 966 F.Supp. 361 (E.D.Pa., 1997); *Puglisi v. Underhill Park Taxpayer Ass'n*, 964 F.Supp. 811, (S.D.N.Y., 1997); *Stryker Corp. v. Intermedics Orthopedics, Inc.*, 962 F.Supp. 357 (E.D.N.Y., 1997); *Epling v. U.S.*, 958 F.Supp. 312 (W.D.Ky., 1997); *Colbert v. Yadkin Valley Telephone Membership Corp.*, 960 F.Supp. 84 (M.D.N.C., 1997); *Oasis Industries, Inc. v. G.K.L. Corp.*, 1997 WL 85167 (N.D. Ill., 1997); *Aetna Cas. and Sur. Co. v. Rock*, 1997 WL 580594 (D.R.I., 1997); *U.S. v. Florida Cities Water Co.*, 1997 WL 373746 (M.D.Fla., 1997); *Sullivan v. Tropical Tuna, Inc.*, 963 F.Supp. 42 (D.Mass., 1997); *Caribbean Bulk Carriers, Ltd. v. Motor-Services Hugo Stampt, Inc.*, 1996 WL 736970 (E.D.La., 1996); *In re Hexcel Corp.*, 1996 WL 732511 (N.D.Cal., 1996); *U.S. v. Waksberg*, 942 F.Supp. 40 (D.D.C., 1996); *Gaskill v. Gordon*, 942 F.Supp. 382 (N.D. Ill., 1996); *In re Combustion, Inc.*, 968 F.Supp. 382 (N.D. Ill., 1996); *Bioxy, Inc. v. Birko Corp.*, 935 F.Supp. 737 (E.D.N.C., 1996); *U.S., for Use and Benefit of McAmis Industries of Oregon, Inc. v. M. Cutter Co.*, 1996

WL 444964 (D.Or., 1996); *Pollis v. New School for Social Research*, 930 F.Supp. 899 (S.D.N.Y., 1996); *Cooperative Finance Ass'n, Inc. v. Garst*, 927 F.Supp. 1179 (N.D.Iowa, 1996); *U.S. for Ben. of Towerridge, Inc. v. T.A.O., Inc.*, 1996 WL 924671 (W.D.Okla., 1996); *Queen's University at Kingston v. Kinedyne Corp.*, 1996 WL 370170, (D.Kan., 1996); *Pryor Resources, Inc. v. Placona*, 1996 WL 370185 (D.Kan., 1996); *Wendy's Intern, Inc. v. Nu-Cape Const., Inc.*, 164 F.R.D. 694 (M.D.Fla., 1996); *PaineWebber Income Properties Three Ltd. Partnership By and Through Third Income Properties v. Mobil Oil Corp.*, 916 F.Supp. 1239 (M.D.Fla., 1996); *Esquivel v. Arau*, 913 F.Supp. 1382, 34 Fed.R.Serv.3d 769 (C.D.Cal., 1996); *Mount Vernon Fire Ins. Co. v. Eastside Renaissance Associates, Ltd.*, 1996 WL 18866 (S.D.N.Y., 1996); *Deriggi v. Legacy Benefits Corp.*, 1995 WL 747839 (S.D.N.Y., 1995); *Alexander S. By and Through Bowers v. Boyd*, 929 F.Supp. 925 (D.S.C., 1995); *Feldstein v. U.S. Postal Service*, 1995 WL 686043 (E.D.Pa., 1995); *Gray v. New York Life Ins. Co.*, 906 F.Supp. 628 (N.D.Ala., 1995); *Keller v. Dalton*, 1995 WL 552978 (E.D.Pa., 1995); *Bowler v. U.S. I.N.S.*, 901 F.Supp. 597 (S.D.N.Y., 1995); *ACLI Government Securities, Inc. v. Rhoades*, 907 F.Supp. 66 (S.D.N.Y., 1995); *Windmoeller & Hoelscher Corp. v. S/S "Nurnberg Atlantic"*, 1995 WL 479495 (S.D.N.Y., 1995); *Marshall & Co., Inc. v. Duke*, 941 F.Supp. 1207 (N.D.Ga., 1995); *Transamerica Premier Ins. Co. v. Ober*, 894 F.Supp. 471 (D.Me., 1995); *Kaufman Malchman & Kirby, P.C. v. Hasbro, Inc.*, 897 F.Supp. 719 (S.D.N.Y., 1995); *Aircraft Braking Systems Corp. v. United Automobile, Aerospace & Agricultural Implement Workers of America, UAW*, 1995 WL 688291 (N.D.Ohio, 1995); *E. Armata, Inc. v. Platinum Funding Corp.*, 887 F.Supp. 590 (S.D.N.Y., 1995); *Doyle v. Turner*, 886 F.Supp. 399 (S.D.N.Y., 1995); *Hicks v. Cylinder Gas, Chemical, Petroleum, Distillery, Auto Service, and Accessory Drivers*, 1995 WL 581258 (E.D.Mich., 1995); *Terrell v. Shalala*, 1995 WL 307157 (N.D. Ill., 1995); *Avedas, Inc. v. Intouch Group, Inc.*, 1995 WL 234561 (N.D. Ill., 1995); *U.S. v. Dinwiddie*, 885 F.Supp. 1299 (W.D.Mo., 1995); *In re Unisys Corp. Retiree Medical Benefits ERISA Litigation*, 886 F.Supp. 445 (E.D.Pa., 1995); *Center Cadillac, Inc. v. Bank Leumi Trust Co. of New York*, 878 F.Supp. 626 (S.D.N.Y., 1995); *Lane v.*

Random House, Inc., 985 F.Supp. 141 (D.D.C., 1995); *U.S. v. Bachner*, 877 F.Supp. 625 (S.D. Fla., 1995); *Cortec Industries, Inc. v. Sum Holding L.P.*, 1994 WL 722708 (S.D.N.Y., 1994); *Felton v. Brown*, 7 Vet.App. 276 (Vet.App., 1994); *McLendon v. Continental Group, Inc.*, 872 F.Supp. 142 (D.N.J., 1994); *Agee v. Paramount Communications, Inc.*, 869 F.Supp. 209 (S.D.N.Y., 1994); *Starkman v. Resolution Trust Corp.*, 1994 WL 577233 (N.D.Ill., 1994); *Lee v. Chambers County Bd. of Educ.*, 859 F.Supp. 1470 (M.D.Ala., 1994); *Johnson v. El Paso Pathology Group, P.A.*, 868 F.Supp. 852 (W.D.Tex., 1994); *TCI of Illinois, Inc. v. Carpenter*, 849 F.Supp. 326 (N.D.Ill., 1994); *Anderson Industries, Inc. v. Towers Perrin, Forster & Crosby, Inc.*, 1994 WL 96684 (N.D.Ill., 1994); *Hudson Motors Partnership v. Crest Leasing Enterprises, Inc.*, 845 F.Supp. 969 (E.D.N.Y., 1994); *In re Generes*, 165 B.R. 1011 (N.D.Ill., 1994); *Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc.*, 1994 WL 74871 (S.D.N.Y., 1994); *Dubin v. E.F. Hutton Group, Inc.*, 845 F.Supp. 1004 (S.D.N.Y., 1994); *Church of Scientology Intern. v. Time Warner, Inc.*, 1994 WL 38677 (S.D.N.Y., 1994); *Oracles Complex Systems Corp. v. Micrographics Corp.*, 1994 WL 34889 (E.D.Pa., 1994); *In re McDonnell Douglas Equipment Leasing Securities Litigation*, 842 F.Supp. 733 (S.D.N.Y., 1994); *Avitts v. Amoco Production Co.*, 840 F.Supp. 1116 (S.D.Tex., 1994); *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F.Supp. 1027 (D.S.C., 1993); *Zate v. A.T. Brod & Co., Inc.*, 839 F.Supp. 27 (M.D. Fla., 1993); *Consumers Gas & Oil, Inc. v. Farmland Industries, Inc.*, 863 F.Supp. 1357 (D.Colo., 1993); *Ertel v. National Fire Adjustment Co., Inc.*, 152 F.R.D. 454 (W.D.N.Y., 1993); *Rodonich v. House Wreckers Union, Local 95 of Laborers' Intern. Union of North America*, 837 F.Supp. 550 (S.D.N.Y., 1993); *In re McDonnell Douglas Equipment Leasing Securities Litigation*, 838 F.Supp. 729 (S.D.N.Y., 1993); *Miller v. Beneficial Management Corp.*, 844 F.Supp. 990 (D.N.J., 1993); *Morris v. Loams and Nettleton Co.*, 825 F.Supp. 979 (D.Kan., 1993); *Volkman v. United Transp. Union*, 826 F.Supp. 1253 (D.Kan., 1993); *HRW Systems, Inc. v. Washington Gas Light Co.*, 823 F.Supp. 318 (D.Md., 1993); *U.S. v. Instruments, S.A., Inc.*, 1993 WL 198842 (D.D.C., 1993); *F.D.I.C. v. Fedders Air Conditioning, USA, Inc.*, 821 F.Supp. 50 (D.Mass., 1993); *St. Paul*

The frequency of the litigation also suggests that review will be a benefit to a substantial number of litigants and jurists.

From a policy perspective, as set forth in more detail below, duty of fair representation litigation plays an important role in the congressional labor scheme. Such litigation provides important checks against the broad powers granted to unions to bargain collectively on behalf of their members. In many instances, the rights involved in a fair representation suit may be important but may not involve monetary recoveries. As this litigation demonstrated, unions control large coffers. The litigation involving intangible rights can be every bit as costly as litigation involving monetary rights. The third circuit's decision in this case effectively discourages the former litigation. In order to encourage members to enforce their intangible rights against unions, and to further strengthen the bulwark against arbitrary union conduct, the third circuit's decision in this matter must be reviewed and reversed.

Finally, the split among the circuits frustrates the goal of uniformity in the law. The differing review standard will encourage litigants to forum shop for favorable

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Fire and Marine Ins. Co. v. Continental Ins. Co., 1993 WL 165861 (D.Md., 1993); *Swedish Hosp. Corp. v. Shalala*, 845 F.Supp. 894 (D.D.C., 1993); *U.S. v. McCombs-Ellison*, 826 F.Supp. 1479 (W.D.N.Y., 1993); *Matter of Arbitration Between Prudential-Bache Securities, Inc. and Depew*, 814 F.Supp. 1081 (M.D.Fla., 1993); *V.S. Intern., S.A. v. Boyden World Corp.*, 1993 WL 59399 (S.D.N.Y., 1993); *Anspach v. Tomkins Industries, Inc.*, 817 F.Supp. 1499 (D.Kan., 1993); *Chesapeake and Potomac Telephone Co. of Virginia v. Peck Iron & Metal Co., Inc.*, 814 F.Supp. 1281 (E.D.Va., 1993); and, *Chesapeake and Potomac Telephone Co. of Virginia v. Peck Iron & Metal Co., Inc.*, 826 F.Supp. 961 (E.D.Va., 1993).

review standards of fee awards. Certiorari should be granted to resolve the split among the circuits and bring uniformity to the applicable standard of review.

If review is granted, the plaintiffs believe that this Court would reverse the third circuit. Fact finding is the responsibility of the district courts, not the appellate courts. *Maine v. Taylor*, 477 U.S. 131, 144-145 (1986). Rule 52(a) clearly provides that findings of fact are to be subjected to the "clearly erroneous" standard of review. *Pullman-Standard v. Swing*, 456 U.S. 273, 287 (1982). Even factual findings that determine the outcome of a case are subject to the "clearly erroneous" standard of Rule 52(a). *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 501 (1984); and *Maine v. Taylor*, supra, at 141. Factual inferences from undisputed facts also receive limited review on appeal. *Commissioner v. Duberstein*, 366 U.S. at 291; and *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 194, n. 8 (1962). Beyond that, the methodology for distinguishing an issue of fact from an issue of law has been elusive.

There are several reasons why the substantial benefit determination should be considered a question of fact subject to the "clearly erroneous" standard of review. First, among those reasons, in a closely analogous setting, the award of attorneys fees under the Labor Management Reporting Disclosure Act ("LMRDA"), the circuits have routinely applied the "clearly erroneous" standard. In such cases, attorneys fees have been awarded to successful plaintiffs in LMRDA suits if it is determined that the litigation provided a "valuable service" to the union and its members. E.g., *Bise v. International Brotherhood of Electrical Workers*, 618 F.2d 1299, 1306 (9th Cir. 1979) cert. den. by 449 U.S. 904 (1980). Those determinations have been

reviewed according to the "clearly erroneous" standard. *Id.* In addition, the components of the other exceptions to the American Rule, such as the bad faith exception and the common fund exception, are routinely reviewed pursuant to the "clearly erroneous" standard. E.g., *Sierra Club v. U.S. Army Corps of Engineers*, 776 F.2d 383, 390 (2d Cir. 1985) cert. den. by 475 U.S. 1085 (1986) (bad faith); and *Swanson v. American Consumer Industries*, 517 F.2d 555, 561 (7th Cir. 1975) (common fund).

Second, the nature of the inquiry lends support to the conclusions that "substantial benefit" is a factual question. See, *Miller v. Fenton*, 474 U.S. 104, 115 (1985). In *Thornburgh v. Gingles*, 478 U.S. 30, 79 (1986), this Court recognized, in a voting rights case, that questions peculiarly dependent of the facts of each case, and which require a peculiarly local appraisal of the impact that an act or policy has on a class of people, argues in favor of factual determinations. The issue in this case turns on the district court's appreciation of the history of the Union's governance and the impact that the litigation had or should have on union governance and behavior in the future. This exact same factor led this Court in *White v. Regester*, 412 U.S. 755, 769-770 (1973) to conclude that a district court's determination of the extent of minority voters' ability to participate in an election was factual. The same result should apply here.

For the reasons discussed more fully above, certiorari should be granted to resolve the conflict among the circuits regarding the appropriate standard of review.

Certiorari Should Be Granted to Resolve a Conflict Among the Lower Courts Regarding the Benefits Conferred By a Successful Plaintiff in a Fair Representation Suit on the Union Membership

As already mentioned, the "common benefit" exception to the American Rule permits a prevailing party to obtain reimbursement of attorneys fees in cases where (i) the litigation has conferred a substantial benefit on the members of an ascertainable class; and (ii) where the court's jurisdiction over the subject matter of the suit makes it possible to spread the costs proportionately among the members of the class. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393-394 (1970). A substantial benefit must merely be something more than technical in its consequence and be something that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights of the party seeking such benefits. *Mills*, supra, at 396.

This Court has recognized that certain statutory policies governing the operations of organizations are so important that plaintiffs who bring lawsuits that enforce those policies provide substantial benefits to the organization and its members and are therefore entitled to the reimbursement of their counsel fees. For example, in *Mills*, supra, the plaintiffs, shareholders in a corporation, established that a corporate merger had been obtained by means of misleading statements in connection with the solicitation of proxies. Attorneys fees were awarded under the "common benefit" theory without any regard for either the severity of the corporation's wrongful conduct or the harm caused by the misstatements. In fact, this Court stated that the mere violation of the securities laws by a corporation and its officers should entitle those

who bring litigation to enforce the law to the reimbursement of their counsel fees. *Id.* at 389-390 & 396. Such suits, this Court recognized, are valuable regardless of the relief awarded, simply because of their enforcement of important rights.

In the field of labor law, like the field of securities law, it is well recognized that some incorporeal rights and policies are so important to the members of a labor union that a suit by one member to enforce his or her individual rights confers a substantial benefit on the entire union. One frequently litigated field of labor law where the issue seems to have been resolved is found in the Labor Management Reporting and Disclosure Act ("LMRDA").

Congress enacted the LMRDA in order to guarantee union members "minimum standards of democratic process." *Hall v. Cole*, 412 U.S. 1, 7 (1972). Title I of the LMRDA – the member's bill of rights – is intended to promote full and active participation by the rank and file in union affairs. *Id.* at 7-8. The policies promoted by Title I are considered so important to members and their rights that this Court in *Hall* recognized that:

> [T]here can be no doubt that by vindicating his own right of free speech guaranteed by . . . Title I of the LMRDA [the plaintiff] necessarily rendered a substantial service to his union as an institution and to all of its members . . . [B]y vindicating his own right the successful litigant dispels the "chill" cast upon the rights of others. Indeed, to the extent that such lawsuits contribute to the preservation of union democracy, they frequently prove beneficial "not only in the immediate impact of the results achieved but in their implication for future conduct of the union's affairs . . . Thus, . . . , reimbursement of [such a plaintiff's] attorneys fees out of the

> union treasury simply shifts the costs of the litigation to the class that has benefited from them and that would have had to pay them had it brought the suit . . . We must therefore conclude that an award of counsel fees to a successful plaintiff in an action under § 102 of the LMRDA falls squarely within the traditional equitable power of federal courts to award such fees . . . .

Hall at pp. 8-9; see also *Donovan v. CSEA Local Union No. 1000*, 784 F.2d 98, 104 (2d Cir. 1986) cert. den. by 479 U.S. 817 (1984) (when union member's suit vindicates his own rights under LMRDA, membership as whole benefits especially where future union conduct is impacted).

In fact, the third circuit itself has made a similar observation of the benefit conferred on union members by suits under the LMRDA. In *Brennan v. United States Steelworkers of America*, 554 F.2d 586 (3d Cir. 1977) cert. den. by 435 U.S. 977 (1978), a candidate for union office prosecuted certain LMRDA violations by the union. For his efforts, he was awarded counsel fees under the "common benefit" exception to the American Rule. The third circuit concluded that because the prosecution of the violations encouraged union democracy, it conferred direct and substantial benefits on the entire union membership. *Id.* at 605.

In *Pawlak*, supra, during the course of a union bylaw amendment referendum, the union president sent letters to members telling them to reject the amendment. The plaintiff then asked the union for a membership list and union funds to finance a countermailing urging members to vote in favor of the amendment. *Id.* at 974. Judgment was entered against the union on the basis that the union

had an obligation under the LMRDA to grant the plaintiff's request. Attorneys fees were awarded in that case because the third circuit determined that the judgment stood as a precedent for future referenda and therefore provided a benefit to the entire union. *Id.* at 980.

Like the LMRDA bill of rights, the duty of fair representation is a federally created statutory duty imposed on unions. *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1014 (3d Cir. 1977) cert. den. by 434 U.S. 837 (1978). The duty arises out of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 157 et seq. *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 46 n. 8 (1979). The goals and policies of the LMRA are to encourage collective bargaining and to achieve industrial peace. E.g., *Foust*, supra, at 46; and *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 265 (1938).

One of the ways that Congress chose to foster collective bargaining was to statutorily empower unions to bargain collectively on behalf of its members. See, *Foust*, supra, at 46; and *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). This power, however, had to be held in check in order to provide some safeguard for the individual rights of union members. As this Court in *Vaca* observed:

> The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining . . . . The collective bargaining system, as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit. . . .

> This Court recognized in *Steel* that the Congressional grant of power to a union to act as exclusive bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination . . . . Since that landmark decision, the duty of fair representation has stood as the bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.

Vaca, supra, at 182 (citations omitted). The doctrine of fair representation has thus evolved to impose upon the exclusive statutory bargaining agent a corresponding duty to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. *Vaca*, supra, at 177. A union breaches the duty when it, for example, arbitrarily ignores its members' rights, or handles those rights in a perfunctory manner as happened in this case.[5] See, *Foust*, supra, at 47.

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[5] This case is very similar to the scenario presented to this Court in *Hines v. Anchor Motor Freight Co.*, 424 U.S. 554 (1975). In that case a union member who lost an arbitration relating to his discharge brought suit against the employer and the union for wrongful discharge. *Id.* at 558. The employee claimed that the Union's perfunctory investigation into the circumstances of the discharge failed to uncover evidence establishing that the charge of "cause" for termination was untrue. *Id.* The issue was whether the employer was entitled to rely on the employee's exhaustion of the grievance arbitration process as a defense to the wrongful discharge suit when the union's handling of the grievance was perfunctory and in violation of the employee's right to fair representation. *Id.* at 561. This Court held that it was not. Like *Hines*, this case also involves charges of fair

As a theoretical proposition, the rights granted to union members by the duty of fair representation are every bit as important to the federal labor goals and policies as are the rights afforded to members under the LMRDA. For purposes of determining whether the enforcement of rights confers a substantial benefit on union membership, the duty of fair representation should be accorded the same deference. In other words, it should be recognized that, as a matter of law, the enforcement of one's own right to fair representation confers a substantial benefit on union membership.

Several circuits that have actually decided the issue, have recognized the substantial benefits that duty of fair representation suits confer on union membership. In *Cruz v. Local Union No. 3, International Brotherhood of Electrical Workers*, 34 F.3d 1148 (2d Cir. 1994), union members brought suit against the union, alleging breach of the duty of fair representation. *Cruz*, supra, at 1150. Though the jury found for the plaintiff and awarded substantial damages, the district court rejected the damages and entered judgment for the nominal amount of one dollar. Although the second circuit in *Cruz* determined that the district court erred in setting aside the damages award

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representation stemming from a Union's failure to conduct even the most minimum investigation. Based solely on bald, unsubstantiated charges that the arbitration proceeding was tainted, Local 54 was ready to reopen the entire proceeding and to jeopardize the Plaintiffs' seniority rights. Local 54 was guided, not by factual evidence of improprieties, or a legal basis for its actions, but solely to appease the members displaced by the award. The same perfunctory review or investigation process which forced the innocent employer in *Hines* to relitigate the discharge claim, is present in this case also.

and ordering only nominal damages, the court nevertheless noted that the plaintiffs need not have recovered any damages at all in order to obtain fees under the substantial benefit exception. *Cruz*, supra, at 1159. The second circuit recognized that a union member who establishes a violation of a union's duty of fair representation confers a benefit on the union members merely by showing a violation of the law. *Id.* (citing, *Rosario v. Amalgamated Ladies Garment Cutters Union*, 799 F.2d 1000, 1007 (3d Cir. 1984)).

In *Emmanuel v. Omaha Carpenters Dist. Council*, 560 F.2d 382 (8th Cir. 1977), the carpenters' union and the employer entered into an agreement whereby the employer was permitted to bypass certain hiring procedures in the collective bargaining agreement. *Id.* at 383. A single member claimed that this agreement violated the collective bargaining agreement, violated his right to fair representation and was the cause of his not being hired. See, *Id.* at 384 & 385. The district court awarded counsel fees to the plaintiff on the basis that:

> [The plaintiff's] lawsuit should prove a substantial impetus to union fair play and honesty not only in the immediate impact of results achieved but in its implication for the future conduct of union affairs.

Id. The eighth circuit affirmed because it agreed that the plaintiff's lawsuit dispelled the chill cast upon hiring procedures. *Id.* at 385.

In *Harrison v. United Transportation Workers Union*, 530 F.2d 558 (4th Cir. 1976) cert. den. by 425 U.S. 958 (1976), the plaintiff was a railroad conductor. The plaintiff successfully sued his union for breach of the duty of fair representation because it was determined that his union abandoned his grievance as part of a compromise with

the employer, to advance the grievance of another member. It was determined that the relinquishment of the plaintiff's grievance, in order to advance the grievance of another member, was arbitrary conduct which violated the plaintiff's right to fair representation. *Id.* at 561-562. The plaintiff was awarded attorneys fees because the fourth circuit recognized that, by vindicating his own right to fair representation in connection with his claims against the employer, he vindicated every member's right to fair representation with regard to claims against the employer.

The decisions from other circuits, therefore, are in accord with the general proposition that duty of fair representation suits, in and of themselves, confer substantial benefits on union membership especially when they provide guidelines or lessons on future union conduct. The third circuit's decision in this case creates a direct conflict with the decisions of the second, fourth and eighth circuits on the exact same issue. Certiorari should be granted to resolve this important principle.

If review is granted, the plaintiffs believe that the third circuit's decision will be reversed. The third circuit in this case acknowledged that the Union had violated the plaintiffs' rights to fair representation. *Polonski*, supra, at 148. The third circuit also acknowledged that the plaintiffs' litigation conferred a direct and substantial benefit on the plaintiffs. *Id.* The court, however, concluded that the plaintiffs' enforcement of their rights to fair representation did not confer a substantial benefit on the union membership. *Id.* at 148. The benefit, according to the third circuit, was limited to the parties at odds in the seniority dispute. *Id.*

The third circuit, in its analysis, seemed to have been searching for a tangible benefit or a threat of immediate harm to the entire Union as a basis for the determination that the Union membership benefited from the plaintiffs' efforts to enforce their rights to fair representation. The third circuit's analysis and decision in that regard is directly in conflict with the decisions of the second circuit, the fourth circuit and the eighth circuit which have all determined that merely establishing a violation of a member's right to fair representation, confers a substantial benefit on all Union members.

The substance of the lesson that the Union should take from this litigation is also an item that cannot be overlooked. The arbitration mechanism provides the backbone for the advancement of the Congressional goal of the peaceful resolution of labor disputes. See, e.g., *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). In final and binding labor arbitration, when an arbitrator publishes an award, the arbitrator's power is, generally, exhausted and he is *functus officio. Local 35 v. The Washington Post Co.*, 442 F.2d 1234, 1238 (D.D.C. 1971) (relying on *United States Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960)). From the analytical viewpoint, a member's rights pursuant to a final and binding labor arbitration award, are akin to contract rights. See, *National Wrecking Co. v. International Brotherhood of Teamsters, Local 731*, 790 F.Supp. 785, 793 (N.D. III. 1992) (relying on *Evans v. Einhorn*, 855 F.2d 1245, 1253 (7th Cir. 1988) aff'd in part, rev'd in part on other grounds by 990 F.2d 957 (7th Cir. 1993)). The judicial enforcement of the award is the equivalent of the specific performance in a contract action. *Id.* (relying on *Textile Workers Union v. Lincoln Mills*

of Alabama, 353 U.S. 448, 451 (1957)). Local 54's conduct in this case jeopardized members' rights not only to fair representation, but also to finality in arbitration awards.

As noted by the Court in *Mills*, a substantial benefit must be something more than technical in nature and which corrects abuses prejudicial to the rights of the party seeking such benefits. The plaintiffs' enforcement of their rights to fair representation, and to the finality of the award, cannot be considered "technical" and certainly corrected abuses prejudicial to their rights. It also provided much needed guidance for future Union conduct. The district court's finding of substantial benefit should have been affirmed. Regardless of the standard of review, the circuit court erred in its conclusion that this particular suit did not benefit union membership. As the district court found, Local 54 has been particularly recalcitrant. Seniority grievances and arbitrations necessarily have to have a substantial likelihood of recurrence. This case, Local 54's recalcitrance aside, now sets very clear guidelines for how such disputes should be handled.

The Union's obligation to protect and pursue the rights of its members is obviously a significant right. See, *Hines*, supra. It is no doubt a right that every member of a labor organization counts on the union to honor. In this case, Local 54 gave short shrift to the plaintiffs' seniority and arbitration rights because it considered the sacrifice of those rights to be an expedient way to deal with other disgruntled members. In situations where claims among its members compete or differ, the Union should have to undertake some minimum level of investigation or review to determine where the merits lie. Unions should not be permitted to place meritless claims on the same footing with meritorious claims simply because it is the

politically opportune thing to do. That is exactly what Local 54 did, or tried to do, to these plaintiffs. By vindicating their rights to be free from arbitrary and perfunctory union conduct, the plaintiffs vindicated every member's right to be free from such conduct and provided the Union with valuable guidance for future union affairs. This very much provided a substantial benefit to the Union as a whole. If certiorari is granted by this Court, the plaintiffs believe that the third circuit's February 18, 1998 order and judgment will be reversed.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

Filed February 18, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5655

JACQUELINE POLONSKI; OSCAR BERRIOS; MICHELE BOYLE; NEIL BROWEN, SR.; JUDY LOWE-BROWN; MARIA BUCHEL; DORI BYRNES; DONNA CAMPO-POLKALSKI; JOANN CARMAN; STEPHANIE POSTLEWAIT-CASTALDI; MICHELE COCOZZA; DORIS SPIEGEL-CONTI; JEANNANNE DELUCA; NOELLE DISOMMA; ELIZABETH J. ELLIS; SHARON FATATO; JAMIE FELDMAN; TYLER FITZGERALD; CINDI FRANCO; TRACEY GIERY; KATURAH GODARO; GUILLERMO RIVERA; MICHAEL HAINSWORTH; SCOTT C. JOHNSON; SANDRA LANCIERI; CATHERINE LIOSI; DEBRA LUPU; RICHARD MARIN; IRENE MARTINEZ; KIM MEERSAND; BEVERLY L. MIRANDA; LINA MONTECALVO; DIANE MOOSHER; MURIEL NALE; VIVIAN NUTLIE; PATRICE PINCHOCK; VINCE POMPILI; KATHLEEN QUINN; DARLENE ROBINSON; THERESA SCHWEIGHARDT; DENISE STAUFFENBERG; JULIE A. STRZMIECHNA; SHARON TABASCO; SHARON TOCCO; KIM VINCI; SALLY WEISDOCK; SHARON WOLF; ROBIN YOUSHAW
(hereinafter Cocktail Servers); MICHAEL RACO; VERONICA WILSON; JOSEPH ANTONELLI; RICHARD FANTE; DANIEL MORANIS; LOUIS NASTASI; RICHARD ROSEN; MAURICE SHERROD; WILLIAM TRACY; JOHN WITHERS,
(hereinafter Bartenders)

v.

TRUMP TAJ MAHAL ASSOCIATES; LOCAL 54, OF THE HOTEL EMPLOYEES RESTAURANT EMPLOYEES INTERNATIONAL UNION (H.E.R.E.I.U.); ABC, INC., (a fictitious name); JOHN DOE, (a fictitious name)

(D.C. Civil 91-cv-03014)

DOROTHEA A. ARCURI; PATRICIA BROOKS, VICTORIA BRYANT; KAREN CARLINI; ROBERT DONOVAN; PHILIP K. FERGUSON; NANCY GUERRERA; ROBERT HINGOS; LEE A. KINSELL; CHARLES MCBRIDE; JUNE MCBRIDE; ROSALIE MCCARTHY; MICHELE MCCARTNEY; JANET M. MEDIO; LINDA MERANUS; GREGORY NATALE; MARIANNE K. ORTZMAN; RONALD PAGANO; ANNA MARIE PLATANIA; GERI SHANNON; DONALD SILANO; JEANETTE SOPUCH; KENNETH W. STRAIN; TRASENA TAUSO; ELIZABETH WALKER; VICTORIA WEGER; RICHARD ZAK; JOANNE CAPETOLA; JOHN LASCOWSKI; ADRIENNE M. PALERMO; MARY ANN PETERSON; SUSAN PETRONE; BARRY L. WRIGHT

v.

TRUMP TAJ MAHAL ASSOCIATES; LOCAL 54, OF THE HOTEL EMPLOYEES RESTAURANT EMPLOYEES INTERNATIONAL UNION, (H.E.R.E.I.U.)

(D.C. Civil No. 91-cv-03529)

Local 54, Hotel Employees and Restaurant Employees International Union,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. No. 91-cv-03014 and No. 91-cv-03529)

Argued December 11, 1997

Before: GREENBERG, ROTH and SEITZ, *Circuit Judges.*

(Opinion Filed: February 18, 1998)

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OPINION OF THE COURT

SEITZ, *Circuit Judge.*

Local 54 Hotel Employees and Restaurant Employees International Union ("the Union") appeals the district court's award of attorney's fees against it under the common benefit exception to the American rule limiting recovery.[1] We will review, under a plenary standard, the legal interpretation of the common benefit doctrine and whether the district court possessed the authority to apply it in a given factual setting. *Marshall v. United Steelworkers*, 666 F.2d 845, 849-50 (3d Cir. 1981).

I. Facts and Procedural History

The facts of this case are undisputed. Between 1989 and 1990, the Union represented the food and beverage employees of the Trump Castle, the Trump Plaza, and the Trump Regency. In April of 1990, management of the newly constructed Trump Taj Mahal failed to recognize the seniority status of certain Union employees transferred from the Trump Regency who were to be granted the highest seniority status pursuant to a collective

[1] The district court exercised jurisdiction under section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, and federal question jurisdiction, 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291 to consider the district court's final order awarding attorney's fees.

bargaining agreement between the Union and Trump representatives. As a result, the Union filed a grievance on behalf of the former Trump Regency employees against the Taj Mahal. This matter was submitted to binding arbitration and resulted in an award sustaining the grievance and directing the Trump Taj Mahal to establish seniority status for the former Trump Regency employees. A group of Trump Taj Mahal employees who were adversely affected by the arbitration award ("the Polonski group") requested Trump Taj Mahal to appeal, but no such action was taken.

By December of 1990, the U.S. Department of Justice filed a civil RICO action against the Union and other individuals in an unrelated matter. *See United States v. Hanley,* Civil No. 90-5017 (D.N.J.). The court approved a consent decree which provided for the resignation of the Union's leadership and the appointment of a special Monitor to oversee Union affairs. Shortly afterwards, the Polonski group confronted the Monitor and alleged that the previous arbitration award had been procured unfairly. The Polonski group also filed suit against the Union in the Superior Court of New Jersey, alleging a breach of the duty of fair representation. This action was later removed to the district court.

In view of these events, the Monitor sought to reopen the arbitration award and submit the entire matter to the arbitrator for redisposition. By August of 1991, the group of employees who benefitted from the arbitration award ("the Arcuri group") filed suit in the district court against

the Union and the Trump Taj Mahal.[2] These plaintiffs sought damages for the Union's breach of the duty of fair representation, and moved to temporarily enjoin the Monitor from attempting to have the arbitration award reopened. After the Union represented that it would not seek to reopen the award, the Arcuri group withdrew their motion for a preliminary injunction, and continued their litigation against the Union for a breach of the duty of fair representation.[3]

Upon cross-motions for summary judgment, the district court held that the Monitor had in fact breached his duty of fair representation by attempting to reopen the arbitration in an arbitrary manner. The court, on September 30, 1994, ordered the Union to pay attorney's fees as damages caused by the Union's violation of the labor laws. The matter was subsequently referred to a magistrate judge to determine the appropriate amount of attorney's fees and costs.

However, by order dated August 1, 1995, the district court reversed its position and held that the plaintiffs were not entitled to attorney's fees as damages under the labor laws. Instead, the court allowed the plaintiffs to recover under the common benefit doctrine all attorney's

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[2] This action was consolidated in the district court with the Polonski lawsuit. However, on June 10, 1994, the district court dismissed the Polonski action for failure to provide discovery. That order is not being appealed.

[3] The Monitor nevertheless held an evidentiary hearing to consider the Polonski group's grievances against the arbitration award. On April 6, 1992, the Monitor eventually issued a decision in favor of the Arcuri group and upheld the award.

fees for aspects of the litigation in which they prevailed.[4] The case was once again referred to the magistrate judge, who recommended a total award of $103,566.30 in attorney's fees and costs. On September 27, 1996, the district court adopted the magistrate judge's recommendation. The Union now appeals the district court orders allowing attorney's fees under the common benefit doctrine and adopting the magistrate judge's ultimate recommendation as the appropriate amount of fees and costs.

II. Jurisdiction of This Court

At the outset, the plaintiffs question the jurisdiction of this court to consider the August 1, 1995 order allowing attorney's fees under the common benefit doctrine. They assert that the Union had previously appealed that order, in addition to the September 30, 1994 order, and this court had dismissed those appeals as untimely under Fed. R. App. P. 4(a)(1). From this, we understand the plaintiffs to make a two-fold argument. They first contend that our prior dismissal renders all matters relating to that appeal final and conclusive. Second, they seem to make the argument that the Union's notice of appeal had only mentioned the district court's final September 27, 1996, order adopting the magistrate judge's recommendation as to attorney's fees under the common benefit doctrine. Because the Union did not include in its notice of

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[4] These two orders were appealed by the Union on May 16, 1996. This court dismissed those appeals as untimely. *See Polonski, et al. v. Trump Taj Mahal, et al.*, Nos. 96-5291, 96-5347 (3d Cir. May 23, 1997) (judgment order).

appeal the August 1, 1995 order, plaintiffs contend that we have no jurisdiction to consider that order.

The plaintiff's first argument – that the appeal of the common benefit issue is precluded by our dismissal of the Union's prior appeal – is meritless. It is well established in our court that an appeal from an order granting attorney's fees is not final unless reduced to an identifiable amount. *Pennsylvania v. Flaherty*, 983 F.2d 1267, 1276-77 (3d Cir. 1993). It goes without saying that a dismissal of a premature attorney's fees appeal carries no res judicata effect, as this court could not have exercised jurisdiction to consider the appeal. With some exceptions not applicable here, this court will only consider an appeal from an attorney's fee determination when it becomes final. *See id.* Thus, the dismissal of the Union's premature appeal of the August 1, 1995 order does not bar our consideration of the issue at this time.

Plaintiffs' second contention – that the Union's failure to explicitly include in its notice of appeal the August 1 order granting attorney's fees – is also without force. While Fed. R. App. P. 3(c) does provide that the notice of appeal must "designate the judgment, order, or part thereof appealed from," an appeal from a final judgment that is identified in the notice will draw into question all non-final orders and rulings which produced the judgment. *Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252, 1253 (3d Cir. 1977) (per curiam). It is almost axiomatic that decisions on the merits are not to be avoided on grounds of technical violations of procedural rules, *see Foman v. Davis*, 371 U.S. 178, 181-82 (1962), and we have read notices of appeal liberally. *See CTC Imports and Exports v. Nigerian Petroleum Corp.*, 951 F.2d 573, 576 (3d

Cir. 1991). Such treatment is particularly appropriate where the order appealed is discretionary and relates back to the judgment sought to be reviewed. *Elfman Motors,* 567 F.2d at 1254.

This court will exercise appellate jurisdiction over orders that are not specified in the notice of appeal where: (1) there is a connection between the specified and unspecified orders; (2) the intention to appeal the unspecified order is apparent; and (3) the opposing party is not prejudiced and has a full opportunity to brief the issues. *See MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1092 (3d Cir. 1995) (citations and internal quotations omitted), *cert. denied,* 117 S. Ct. 64 (1996); *Lusardi v. Xerox Corp.*, 975 F.2d 964, 972 (3d Cir. 1992); *Williams v. Guzzardi,* 875 F.2d 46, 49 (3d Cir. 1989). In the attorney's fee context, this court has found that "an adequate connection exists between a specified order that designates the prevailing party for purposes of attorney's fees and an unspecified order that quantifies the attorney's fee award." *MCI Telecommunications,* 71 F.3d at 1093. Similarly, where "subsequent appellate proceedings manifest the appellant's intent to appeal the attorney's fees issue," and where "the opposing party had and exercised a full opportunity to brief the issue and did not raise any claim of prejudice," this Court has found a notice of appeal specifying one attorney's fee order sufficient to confer jurisdiction over an appeal from another unspecified attorney's fee order in the same case. *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 156 n.10 (3d cir. 1994). In this case, the earlier attorney's fee order was connected to the order specified in the notice of appeal in that the earlier order established the legal basis for the

award of fees that was reduced to a final amount in the specified order. The appellate proceedings clearly manifest an intent to appeal the common benefit issue decided in the first order, and there is no prejudice since both parties have fully briefed the issues. Accordingly, we find the notice of appeal from the September 27, 1996 final order adopting the magistrate judge's fee recommendation sufficient to confer jurisdiction over the appeal from the earlier order granting attorney's fees under the common benefit exception.

III. The Common Benefit Doctrine

A. Requirements for Applicability

We now turn to the merits of this appeal. By way of background, it is well established that the traditional American rule disfavors the award of attorney's fees in the absence of statutory or contractual authorization. *Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters and Joiners*, 456 U.S. 717, 721 (1982). Under the exercise of its equitable powers, however, a federal court may fashion an attorney's fees award to successful litigants who confer a common benefit upon a class of individuals not participating in the litigation. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970). At the heart of this exception is a concern for fairness and unjust enrichment; the law will not reward those who reap the substantial benefits of litigation without participating in its costs. As explained by the Supreme Court, "[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's

expense." *Id.* at 392. The origins of this doctrine can be traced to the common fund rule whereby those who share in a fund must participate in paying attorney's fees when a prevailing plaintiff's litigation redounds to the benefit of the common fund. *See Hall v. Cole*, 412 U.S. 1, 5 n.7 (1972); 1 Dan B. Dobbs, Law of Remedies § 3.10(2) (2d ed. 1993).

Under the common benefit doctrine, an award of attorney's fees is appropriate where "the plaintiff's successful litigation confers 'a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them.' " *Hall*, 412 U.S. at 5 (quoting *Mills*, 396 U.S. at 393-94). This test entails satisfying three distinct elements: (1) the plaintiff must confer a substantial benefit; (2) to members of an ascertainable class; and (3) the court must ensure that the costs are proportionally spread among that class. Because this test may be read literally to include every lawsuit against any institutional defendant, we have refined this language further. In *Marshall v. United Steelworkers*, 666 F.2d 845, 848 (3d Cir. 1981), this court inquired: (1) whether the benefits may be traced with some accuracy; (2) whether the class of beneficiaries are readily identifiable; and, (3) whether there is a reasonable basis for confidence that the costs may be shifted with some precision to those benefitting.

B. The Arguments

In examining the applicability of the common benefit doctrine, the district court recounted the *Mills* test of substantial benefit, commonality, and apportionment. The court stated without comment that the plaintiffs satisfied the last two elements of commonality and apportionment. As to substantial benefit, the court reasoned that the plaintiffs, through their lawsuit, taught the Union a "generalized lesson" that it should respect the finality of arbitration. Because all Union members would benefit from the Union's respect for the law, the district court concluded that there was indeed a common benefit which mandated fee shifting to achieve equity.

The Union on appeal initially argues that the common benefit doctrine cannot apply to fair representation actions under the labor laws. The Union's argument here is that duty of fair representation cases "are no different in conception from a lawsuit by a person injured in a motor vehicle accident." Br. at 18. In the Union's view, to award attorney's fees in these types of cases would constitute a derogation of the American rule because these actions, like negligence claims, are not well suited to vindicate public rights.

In the alternative, the Union posits that none of the *Mills* common benefit elements are met in this case. There was no substantial benefit, the Union contends, because the plaintiffs' litigation was not a "general vindication" of Union members' rights. Even if there were a benefit, the Union argues that it was not a common one because the plaintiffs benefitted by vindicating their own seniority rights, and the other Union members did not stand to

share that benefit in common with the plaintiffs, as their seniority interests were in fact adverse to the plaintiffs. Finally, the Union notes that there would be no way to achieve true apportionment in this case because attorney's fees would come out of Union funds to which all members contribute pro rata, yet all Union members would not benefit equally from the litigation.

The plaintiffs, on the other hand, argue that their litigation against the Union had established a violation of fair representation duties owed to them under the labor laws. From this, they assert that a substantial benefit has been rendered to all Union members through the vindication of this legal right. They consequently conclude that fee-shifting under the common benefit doctrine is appropriate in this case.

C. The Test Applied

In order to determine the availability of attorney's fees under the common benefit doctrine, this court must apply the three part test announced in *Mills* and its progeny. We cannot accept the Union's argument that fair representation cases cannot form the basis for attorney's fees under this theory of fee-shifting. As we have previously stated, the common benefit doctrine stems from an inherent power to fashion equitable relief, and we have not hesitated to summon this authority where "overriding considerations indicate the need for such a recovery." *Brennan v. United Steelworkers*, 554 F.2d 586, 600 (3d Cir. 1977) (quoting *Mills*, 396 U.S. at 391-92). Application of the doctrine is not predicated upon the type of action

sustained, but depends instead on the equitable circumstances of each case. Indeed, the Supreme Court and lower federal courts have applied the doctrine in a myriad of circumstances without announcing absolutes regarding applicability. *See* 1 Mary F. Derfner & Arthur D. Wolf, Court Awarded Attorney Fees ¶ 3.01[5] (1997) (surveying cases). We will accordingly apply each of the *Mills* criteria to examine whether the district court possessed the legal authority in the present context to award attorney's fees under the common benefit doctrine.

The first element to be analyzed is the existence of a "substantial benefit" common to all class members that may be traced with some accuracy. We have previously held that attorney's fees may be proper even though the benefit conferred is nonpecuniary in nature. *Merola v. Atlantic Richfield Co.*, 515 F.2d 165, 169-70 (3d Cir. 1975). As *Mills* makes clear, "[t]he fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale." 396 U.S. at 392. What is of utmost importance here is the nature and quality of the common benefits attained from litigation rather than any particular quantification into dollar amounts. As a result, the fact that the plaintiffs did not procure damages in their action against the Union is inapposite to our analysis and would not, on its own, preclude fee-shifting under the common benefit doctrine.

However, federal courts must scrutinize the benefits conferred from litigation carefully, lest the doctrine overwhelm the American rule that each party is to bear its own litigation costs. The general policy is that attorney's fees should be awarded "in limited circumstances" absent

a fee-shifting statute or contract. *Alyeska Pipeline*, 421 U.S. at 257-58; *see also Aguinaga v. United Food and Commercial Workers Int'l Union*, 993 F.2d 1480, 1485 (10th Cir. 1993). In this regard, the mere vindication of a legal right by one class member is not necessarily a substantial benefit that would trigger the application of the doctrine. *See, e.g., Crane Co. v. American Standard, Inc.*, 603 F.2d 244, 255 (2d Cir. 1979); *Bailey v. Meister Brau, Inc.*, 535 F.2d 982, 995-96 (7th Cir. 1976). The Supreme Court illustrated this principle in exploring the substantial benefits gained from a shareholders derivative suit brought to challenge a violation of the securities laws:

> [A] substantial benefit must be something more than technical in its consequence and be one that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest.

Mills, 396 U.S. at 396 (quoting *Bosch v. Meeker Cooperative Light and Power Ass'n*, 257 Minn. 362, 366, 101 N.W.2d 423, 427 (1960)). More specifically, a common benefit is substantial where, by vindicating the important statutory policy at issue, the plaintiff has rendered a "substantial service" to all members of the class. *Id.* This substantial service is typically one that not only corrects an abuse prejudicial to an essential right, but also impacts the future conduct of the defendant's affairs. *Hall*, 412 U.S. at 8 (quoting *Yablonski v. United Mine Workers*, 466 F.2d 424, 431 (D.C. App. 1972)). Were the rule otherwise, any legal victory over an institutional defendant by one of its members would lead to fee shifting through the common

benefit doctrine. *See* 1 Dobbs, supra, § 3.10(2). Indeed, the narrowly tailored common benefit exception might provide an impermissible back door to the "private attorney general" framework that was rejected in *Alyeska Pipeline. See Alyeska Pipeline,* 421 U.S. at 264 n.39; *Shimman v. International Union of Operating Eng'r, Local 18,* 744 F.2d 1226, 1235 n.13 (6th Cir. 1984); *Bailey,* 535 F.2d at 995-96;

We take particular guidance from the Supreme Court's decision in *Hall* itself, which considered the common benefit doctrine in the context of a dispute between Union members and Union leadership. The plaintiff in *Hall* received reinstatement to the Union after he was discharged pursuant to a Union rule proscribing "deliberate or malicious vilification with regard to the execution or the duties of any office or job." *Hall,* 412 U.S. at 3. In considering the same *Mills* factors pertinent to our discussion here, the Court identified the main purpose of the statute at issue and whether the plaintiff's litigation, by vindicating the relevant statutory policies, rendered a substantial service to an ascertainable class. *Hall,* 412 U.S. at 8. The Court reasoned that the lawsuit had vindicated an important free speech right, which "necessarily rendered a substantial service to [the] Union as an institution and to all of its members." *Id.* In particular, the successful plaintiff had dispelled a "chill" cast upon the free speech rights of all Union members by invalidating a Union rule that was found repugnant to the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"). Thus, fee shifting in that case was appropriate under the common benefit doctrine.

In *Brennan v. United Steelworkers,* 554 F.2d 586 (3d Cir. 1977), this court extended that principle to voting rights

violations under the LMRDA. We initially noted that the LMRDA "was intended to provide union members with protection from the type of attempts to thwart the wishes of union members and impair union democracy." *Id.* at 601. Given the facts before us in *Brennan,* we had little doubt that the types of voting violations evident in that case would spread to other Union districts and ultimately render union democracy nothing more than a hollow promise. *Id.* at 605. Because the plaintiff's lawsuit in *Brennan* contributed to the vindication of the entire democratic process and necessarily redounded to the benefit of the whole union, we held that fee-shifting was particularly applicable.

Applying these principles, we find that the district court erred in its legal conclusion that all Union members derived a substantial benefit from the Union's receiving a "generalized lesson" that an arbitrator may not reconsider the merits of a final arbitration award. Simple "generalized lessons" of well-established law are not substantial benefits that form the basis of fee shifting. Otherwise, whenever a defendant violates a right common to all its membership, fee shifting would be appropriate without any inquiry into the nature of the "substantial service" rendered to those who will ultimately pay for the litigation. This has never been the analysis and equity will not hinge on a result that is merely "technical in nature." *Mills,* 396 U.S. at 396.

There is little doubt that plaintiffs' litigation conferred a substantial benefit among some of those involved in the internal seniority dispute between Union factions. The Arcuri group of Union members directly benefited from the outcome in that it prevented the Union from

attempting to reopen a favorable arbitration award and procured a judgment that it was not being treated fairly as required under the duty of fair representation. But this alone cannot be the basis of fee-shifting under the common benefit doctrine because the plaintiffs seek to collect fees from the Union treasury, which necessarily implies that all Union members must have benefitted from the litigation.

Here, we cannot see what substantial benefits redounded to the benefit of all the Union members. This is not a case where the plaintiffs' litigation corrected a "deceit practiced on the stockholders as a group," as was evident in *Mills* itself. 396 U.S. at 392 (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)). Nor did the successful litigants realistically dispel any "chill" associated with a Union abuse prejudicial to the enjoyment of essential rights by the entire Union membership. This dispute between Union factions can hardly be analogized to *Hall* and its progeny, where violations of first amendment or voting rights necessarily resulted in an immediate harm to the promise of Union democracy or the freedom of expression. Similarly, the lawsuit did not "establish[ ] significant new principles of law" beneficial to all Union members. *Marshall v. United Steelworkers*, 666 F.2d 845, 853 (3d Cir. 1981).

In the end, nothing in the present litigation indicates a "substantial service" rendered to the entire Union membership such as would justify an equitable award of attorney's fees. All the facts before us indicate that the internal seniority grievances among Union members directly at odds with each other had no broader implications to

those completely divorced from the context of the dispute. The record cannot fairly support a legal conclusion that the Union's attempt to reopen arbitration was a practice that threatened "the enjoyment or protection of an essential right" to the entire Union's interest. *Mills*, 396 U.S. at 396. Nor can we see how fee shifting in the present case would establish a policy that would "encourage unions to more zealously represent employees' interests." *Cruz v. Local Union No. 3 Of the Int'l Brotherhood of Elec. Workers*, 34 F.3d 1148, 1159 (2d Cir. 1994). It is important to emphasize that the logic underlying the common benefit doctrine is restitutionary in nature, not punitive or limited to labor policy. *Hall*, 412 U.S. at 6-7. Union members here would not be unjustly enriched at the plaintiffs' expense.

Accordingly, we will reverse the district court's attorney's fee award under the common benefit doctrine. Because we hold that the district court did not possess the authority to shift fees, we need not reach the validity of the precise amount recommended by the magistrate judge and adopted by the district court.

IV. Conclusion

For the foregoing reasons, we will reverse the district court order granting attorney's fees.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DOROTHEA A. ARCURI, et. al., Plaintiffs, vs. TRUMP TAJ MAHAL ASSOCIATES, et. al., Defendants.	CIV. NO. 91-3529 (SSB) OPINION (Filed Sep. 30, 1994)

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BROTMAN, DISTRICT JUDGE:

Presently before the court are the cross-motions of defendants and plaintiffs for summary judgment. For the reasons set forth below, defendants' motion is granted in part and denied in part, and plaintiffs' cross-motion is granted in part and denied in part.

I. Factual and Procedural Background

During the years of 1989 and 1990, Local 54, Hotel Employees and Restaurant Employees International Union ("Union" or "Local 54") represented the food and beverage employees of the Trump Plaza, Trump Castle and Trump Regency. Defendant's Memorandum of Law in Support ("Def. Memo"), at 2. On February 9, 1990, the Union and Trump representatives signed a transfer agreement which adopted the terms of the collective bargaining agreement between the Union and the Plaza, and provided that upon the opening of the Taj Mahal, former employees of the Plaza, Castle and Regency would be granted the highest seniority numbers upon their transfer to the Taj Mahal. Defendant's Exhibit ("Def. Ex.") 10, at ¶ 3(b), (g). Upon its April 2, 1990 opening, the Taj Mahal failed to recognize the seniority status of employees transferred from the Regency. Def. Memo, at 3. As a

result, on April 10, 1990, Union President Roy Silbert filed a grievance on behalf of the former Regency employees against the Taj Mahal. *Id.* This matter was submitted to binding arbitration.

The arbitration was held on September 6, 1990. On December 8, 1990, Arbitrator Richard Kasher issued an award sustaining the grievance and directing the Employer to "establish seniority and status for the former Regency employees." Def. Ex. 9, at 23. A number of other employees adversely affected by the arbitrator's decision requested the Taj Mahal to appeal the Kasher award. Def. Ex. 26, at 1. After reviewing the situation with its attorneys, the Taj Mahal decided not to appeal the award, and on February 1, 1991, announced that it would implement the Kasher award. *Id.* In a letter to its beverage department employees, the Taj Mahal promised to publish immediately the updated seniority lists and to hold a rebid[1] five days later. *Id.*

On February 12, 1991, Kevin Smart, the Taj Mahal director of labor relations, sent a letter to Timmie Hilferty, the Union secretary treasurer, confirming that the Taj Mahal has completed the revision of the seniority list in accordance with the Kasher award. Def. Ex. 29. Smart further stated that although the Taj Mahal intended to

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[1] During oral arguments, Mr. Lieverman, counsel for the Union, defined a rebid as a periodic procedure whereby the employer reshuffles all job positions on the basis of the current seniority status of the employees. Thus, the employees do not need to wait for a job opening to be able to assert their seniority number. Instead, during a rebid, the employer newly assigns all positions to the employees on the basis of their seniority numbers.

conduct a rebid following publication of the updated seniority lists, it has determined that business conditions indicate there is no need for a rebid at this time. *Id.* The letter also provided that all beverage employees would be entitled to exercise their seniority numbers when positions became available or upon a rebid. *Id.*

On December 19, 1990, in an unrelated matter, the U.S. Department of Justice filed a civil RICO action against Local 54, its individual leaders, and officers of the International Union. *United States v. Hanley*, Civil No. 90-5017 (D.N.J.). Judge Garrett E. Brown, Jr. approved a consent decree between the parties in this suit on April 12, 1991, and on April 19, 1991, appointed James F. Flanagan, III as the Monitor for Local 54. *See* Def. Ex. 19, 20.

Shortly after his appointment, Flanagan was confronted by several dozen Taj Mahal cocktail servers who were adversely affected by the Kasher award. These employees alleged that they were not permitted to attend the arbitration, that Union President Roy Silbert had testified falsely at the arbitration, and that a witness who possessed relevant information was not called to appear at the arbitration hearing. Def. Ex. 20, at ¶ 3-4. On June 10, 1991, a group of these adversely affected employees (the "Polonsky group") filed suit against the Union in the Superior Court of New Jersey (Atlantic County) alleging breach of the duty of fair representation. Def. Memo, at 1. The Union then removed the suit to this Court. Flanagan also learned that an unfair labor practices charge was pending before the National Labor Relations Board ("NLRB") concerning the award of seniority to the former Regency Employees. Def. Ex. 20, ¶ 5. In view of the

complaints by adversely affected employees, the pending lawsuit, and the unfair labor practices charge pending before the NLRB, Flanagan decided to reopen[2] the arbitration award and submit the entire matter to Arbitrator Kasher for disposition. *Id.* at ¶ 6-7. Accordingly, on July 11, 1991, the Union requested the Taj Mahal to defer scheduling a rebid until Arbitrator Kasher could consider the matter. Def. Ex. 37.

On August 7, 1991, the group of employees benefited by the arbitration award (the "Arcuri group") filed suit in this Court against the Union and the Taj Mahal.[3] Def. Memo, at 10. This Court enjoined all proceedings before Arbitrator Kasher by a temporary restraining order entered on August 8, 1991. The Arcuri plaintiffs filed a motion for a preliminary injunction in order to prevent Arbitrator Kasher from reopening the award. However, during hearings on the preliminary injunction, the Union represented on the record that it would not seek to reopen the December 8, 1990 arbitration award. Plaintiffs subsequently withdrew their motion for preliminary

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[2] Flanagan wanted to submit the evidence presented by the Polonsky group to Arbitrator Kasher and have him re-evaluate his earlier decision in accordance with this new information. Kasher would be permitted to change his earlier decision if the new evidence indicated that the earlier decision was erroneous. However, this action by Flanagan is tantamount to actually reopening the earlier arbitration award.

[3] By order filed on December 28, 1992, the *Arcuri* and the *Polonsky* cases were consolidated. However, the *Polonsky* case was subsequently dismissed with prejudice by an order filed on June 10, 1994 for failure to provide discovery ordered by the Court.

injunction, and this Court ordered the motion dismissed on August 23, 1991.

Monitor Flanagan then commenced his own evidentiary hearing on the complaints of the Polonsky plaintiffs on September 3, 1991. Def. Memo, at 11. On October 18, 1991, the Taj Mahal conducted a general rebid placing the Arcuri plaintiffs into new employment positions on the basis of their new seniority status. *See* Plaintiff's Memorandum in Opposition ("Pl. Memo"), at 9. On April 6, 1992, Flanagan issued a decision in favor of the Arcuri plaintiffs upholding the arbitration award. Through his investigation, Flanagan concluded that the Union did not perpetrate a fraud upon the complaining cocktail servers and that the Union did not breach its duty of fair representation to these union members. Def. Ex., at 17-18.

In their suit against the Trump Taj Mahal Associates[4] and Local 54, plaintiffs allege that: (1) the Union breached its duty of fair representation by failing or refusing to timely implement the December 8, 1990 arbitration award, and (2) the Union breached its duty of fair representation by attempting to reopen the arbitration award seven months after its issuance. Defendant Union has

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[4] On July 16, 1991, the Taj Mahal filed for reorganization under Chapter 11 of the Bankruptcy Code. Def. Memo, at 1. On July 6, 1992, the Bankruptcy Court ruled that the plaintiffs' action against the Taj Mahal was barred by the automatic stay provisions of the Bankruptcy Code. Subsequently, on July 23, 1993, this Court ordered all claims against the Taj Mahal stayed, but permitted the plaintiffs to pursue their claims against the Union. *Arcuri v. Trump Taj Mahal Associates and Local 54*, No. 91-3529, slip op. at 6-8 (D.N.J. Jul. 23, 1993).

moved, and plaintiffs have cross-moved, for summary judgment.

II. Discussion

A. Summary Judgment Standard

The standard for granting summary judgment is a stringent one. A court may grant summary judgment only when the materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Hersh v. Allen Prods. Co.*, 789 F.2d 230, 232 (3d Cir. 1986); *Lang v. New York Life Ins. Co.*, 721 F.2d 118, 119 (3d Cir. 1983). In deciding whether there is a disputed issue of material fact the court must view all doubt in favor of the non-moving party. *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307 n.2 (3d Cir. 1983), *cert. denied*, 465 U.S. 1091 (1984); *Smith v. Pittsburgh Hahe & Supply Co.*, 464 F.2d 870, 874 (3d Cir. 1972). The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Supreme Court decision's mandate that "a motion for summary judgment must be granted unless the party opposing the motion can produce evidence which, when considered in light of that party's burden of proof at trial, could be the basis for a jury finding in that party's favor." *J.E. Mamive & Sons, Inc. v. Fidelity Bank*, 813 F.2d 610, 618 (3d Cir. 1987) (Becker, J., concurring) (citing *Anderson*, 477 U.S. 242, and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). Moreover, once the moving party has carried its burden

of establishing the absence of a genuine issue of material fact, "its opponent must do more than simply show that there is some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Thus, if the non-movant's evidence is merely "colorable" or is "not significantly probative," the court may grant summary judgment. *Anderson*, 477 U.S. at 249-50.

B. Plaintiffs' Breach of the Duty of Fair Representation Claim – Union's Failure or Refusal to Timely Implement the Arbitration Award

Plaintiffs claim that the Union breached its duty of fair representation by failing and/or refusing to timely implement Arbitrator Kasher's award. The plaintiffs contend that the Union should have compelled the Taj Mahal to conduct a general rebid soon after the award was handed down.

A labor union has a statutory duty to fairly represent all of the employees in its bargaining unit. *Vaca v. Sipes*, 386 U.S. 171, 177 (1966). A breach of the duty of fair representation only occurs when a union's conduct toward a member is either "arbitrary, discriminatory, or in bad faith." *Id.* at 190; *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 372 (1990). "The doctrine of fair representation is an important check on the arbitrary exercise of union power, but it is a purposely limited check, for a 'wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents.' " *United Steelworkers*, 495 U.S. at 374 (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338

(1953)). Mere negligence is insufficient to state a claim for a breach of the duty of fair representation. *United Steelworkers*, 495 U.S. at 372; *see also Bazarte v. United Transp. Union*, 429 F.2d 868, 872 (3d Cir. 1970) (finding that mere negligence or poor judgment of the union is not enough to establish unfair representation); *Balsavage v. Ryder Truck Rental, Inc.*, 712 F. Supp. 461, 466 (D.N.J. 1989) (union is held to the lesser standard of avoiding gross negligence, malice or bad faith).

In the present case, the Union filed a grievance on plaintiffs' behalf, submitted the matter to arbitration, and obtained an arbitration award in the plaintiffs' favor. Arbitrator Kasher's December 8, 1990 award directed the employer to "establish seniority and status" for the plaintiffs. Def. Ex. 9, at 23. Union representatives prepared a list of revised seniority numbers and presented it to the Taj Mahal in late December. Def. Memo, at 7. In a letter dated January 22, 1991, Union President, Roy Silbert, demanded implementation of the arbitration award by the end of the week, noting the continuing delay in compliance. Def. Ex. 28. Mr. Silbert also threatened that if the award was not implemented by the end of the week, the Union would pursue additional damages and relief. *Id.* A Taj Mahal memorandum issued on February 1, 1991 explained that the award had not been implemented because the employer was considering an appeal. Def. Ex. 26. The memorandum further stated that the award will be implemented immediately. *Id.* On February 12, 1991, the Union received a letter from the Taj Mahal stating that the seniority lists had been updated and that a rebid did not need to be conducted at the time based on business and operational needs. Def. Ex. 29. As of the date of this

letter, the Union was under the impression that the Kasher award had been fully implemented with regard to the plaintiffs' seniority.

The plaintiffs, however, claim that the arbitration award cannot practically be implemented without a rebid and that the Union breached its duty of fair representation by failing to compel the employer to conduct a rebid. In support of their position that the Union had the right to compel the employer to conduct a rebid, the plaintiffs refer to article 3, § 6 of the Collective Bargaining Agreement. *See* Pl. Appendix Ex. F, at 10-12. However, contrary to the plaintiffs' position, article 3, § 6 merely states that seniority shall govern determinations as to shifts of work. This section does not even refer to rebids, let alone permit the union to compel a rebid. This section clearly does not "unambiguously give the union the right . . . to compel a general rebid" as the plaintiffs allege. Pl. Memo, at 16 n.17.

Plaintiffs further argue that the Union "believed" it could compel the employer to conduct a rebid by relying on depositions of Carol Leidy and Gene Hudgins, Union representatives, and on various letters written by union and employer representatives. Plaintiffs refer to Roy Silbert's January 22, 1991 letter (Def. Ex. 28), Peter Pantaleo's February 1, 1991 letter (Pl. Appendix Ex. D), Kevin Smart's February 1, 1991 memo (Pl. Appendix Ex. E) and Gene Hudgins' March 13, 1991 letter (Pl. Appendix Ex. C). Roy Silbert's letter was written before the employer updated the seniority lists and merely demanded that the employer implement the Kasher award by the end of the week. Peter Pantaleo's letter advised the Taj Mahal that

appeal of the arbitration award would be futile and recommended that the Kasher award be implemented. Edward Tracy's memo[5] informed the beverage department employees that the seniority lists would be revised in compliance with the Kasher award and that the employer will hold a rebid five days after publishing the revised list. Plaintiffs' counsel fails to mention that in a February 12, 1991 letter, Kevin Smart informed the Union that a rebid would not be conducted because it was not warranted by the employer's business and operational needs. Def. Ex. 29. Gene Hudgins' letter explicitly states that "[t]o this date March 13, 1991 the implementation has only been *partial because* the Company has not paid the required 18 month rate to the designated transfers." Pl. Appendix Ex. C, at 2 (emphasis added). Careful and searching review of these documents demonstrates that they are bereft of any inferences suggesting that the Union had a right to compel the employer to conduct a rebid. In fact, the depositions that plaintiffs refer to clearly state that "[W]e [the union] are fully aware that we don't have the power to enforce rebids," Def. Ex. 29, at 121, and that "it is a general understanding that in the history of the industry that the employer controls the rebid." Pl. Appendix Ex. B, at 142. Thus, plaintiffs have failed to offer any evidence to suggest that a genuine issue of material fact exits on the issue of whether the Union has the right to compel an employer to conduct a rebid.

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[5] The February 1, 1991 memorandum that plaintiffs' counsel refers to was actually written by Edward Tracy, not Kevin Smart.

Even if the Union did have the power to compel an employer to conduct a rebid, the Union acted reasonably and in good faith in concluding that the Kasher award did not direct the employer to conduct a rebid. First, during oral arguments, both parties agreed that the Kasher award does not expressly provide for a rebid. Furthermore, a review of the arbitrator's opinion reveals no basis to form the inference that the arbitrator intended the implementation of the award to involve a rebid by the employer. In fact, Arbitrator Kasher, in his opinion, stated that "[t]he Taj, and the Taj only, under the terms of the transfer agreement had and has the authority . . . to determine how and under what circumstances employees . . . will be entitled to their previously earned seniority rights." Def. Ex. 9, at 20-21. From the Court's perspective, the arbitration award is, at best, ambiguous as to whether the employer must conduct a rebid in order to implement the award. As a result, the Union's determination that the Kasher award did not provide it with the power to force the Taj Mahal to conduct a rebid cannot be "characterized as so far outside a 'wide range of reasonableness,' . . . that it is wholly 'irrational' or 'arbitrary'." *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 78 (1991). Accordingly, plaintiff cannot establish a breach of the duty of fair representation and their claim fails as a matter of law.[6]

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[6] Furthermore, soon after the April 19, 1991 appointment of James Flanagan as the Monitor for Local 54, several dozen union members adversely affected by the Kasher award complained to the Monitor that the arbitration was plagued by fraud. *See* Def. Ex. 20, at ¶ 3-4. Having heard such complaints, the Union, even if it had the power to do so, could not have compelled a rebid by

C. Plaintiffs' Breach of the Duty of Fair Representation Claim – Union's Attempt to Reopen the Arbitration Award

1. Did the Union Breach its Duty of Fair Representation?

Plaintiffs claim that the Union breached its duty of fair representation by attempting to reopen the Kasher arbitration award. "As a general rule, once an arbitration panel renders a decision regarding the issues submitted, it becomes *functus officio* and lacks any power to reexamine that decision." *Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 331 (3d Cir. 1991); *see also Teamsters Union Local No. 115 v. Desoto, Inc.*, 725 F.2d 931, 940 (3d Cir. 1984); *La Vale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569, 572 (3d Cir. 1967); *McClatchy Newspapers v. Cent. Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir. 1982); *United Mine Workers of Am., District 28 v. Island Creek Coal Co.*, 630 F. Supp. 1278, 1279 (W.D.Va. 1986). The policy underlying this general rule is

> an unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion. The continuity of judicial office and

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the employer without breaching its duty of fair representation to these other union members. The Monitor's determination to hold hearings to investigate these allegations was proper and reasonable, and did not constitute a breach of the duty of fair representation to the plaintiffs.

> the tradition which surrounds judicial conduct is lacking in the isolated activity of an arbitrator.

La Vale Plaza, 378 F.2d at 572; *Colonial Penn*, 943 F.2d at 331-32; *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*, 442 F.2d 1234, 1238-39 (D.C. Cir. 1971).

Accordingly, as a general rule, absent the mutual consent of the parties, an arbitrator may not interpret, impeach or explain a final arbitration award. *Colonial Penn*, 943 F.2d at 333; *Local P-9, United Food & Commercial Workers Int'l Union v. George A. Hormel & Co.*, 776 F.2d 1393, 1395 (8th Cir. 1985); *Island Creek Coal*, 630 F. Supp. at 1279-80. Even the availability of new evidence or witnesses whose testimony would directly contradict the findings of the arbitrator on central issues does not make it appropriate for the arbitrator to reconsider his original determination of the issues. *McClatchy Newspapers*, 686 F.2d at 733; *Washington-Baltimore Newspaper Guild*, 442 F.2d at 1238. "Arbitrators are not and never were intended to be amenable to the 'remand' of a case for 'retrial' in the same way as a trial judge." *Washington-Baltimore Newspaper Guild*, 442 F.2d at 1238. *Accord Colonial Penn*, 943 F.2d at 334; *McClatchy Newspapers*, 686 F.2d at 733.

The defendant Union alleges that because the employer did not object to the Union's reopening of the Kasher award, it had in fact consented to resubmit the issues for Arbitrator Kasher's reevaluation. This Court finds that the record lacks any evidence of consent by the Taj Mahal to reopen the December 8, 1990 arbitration decision. At the time that the Union sought the reopening

of the Kasher award, the Taj Mahal had already complied with the award by reassessing the seniority status of the union membership. Thus, the employer had no reason to consent to the reopening of the Kasher award. Furthermore, the documents which the Union offers in support of its position indicate that the employer understood the Union's reopening of the Kasher award to be an internal mechanism aimed at helping the Union adopt a position on the proper resolution of the seniority status controversy of its membership. *See* Def. Ex. 41. Clearly, the Taj Mahal deemed itself to have "no proper role in the decision-making process" of the Union. *Id.* Additionally, in a letter to the Union's attorneys, Taj Mahal's counsel reaffirmed that the Taj Mahal never intended to participate in this new arbitration. *Id.* The fact that the employer may have agreed to adjust the seniority status of its employees in accordance with information supplied by the Union in no way establishes its consent to reopen the arbitration and, in effect, retry the issues resolved in the December 8, 1990 arbitration decision. *See* Def. Ex. 21. Adjusting the seniority status of its employees in accordance with the Union's records is proper procedure for an employer. Accordingly, the defendant Union cannot establish that it had obtained consent to reopen the arbitration.

As a result, the union acted improperly and arbitrarily when it attempted to reopen the arbitration award. Monitor Flanagan sought to reopen the arbitration decision in front of Arbitrator Kasher "for the sole purpose of allowing . . . [the complaining union members] to present . . . [their] evidence at the new hearing." Def. Reply Brief, at 9. Flanagan believed that a neutral arbitrator would be an appropriate body to examine the dispute

among the union membership. *Id.* at 12. However, arbitrators are not judges and cannot retry a case the same way a judge would. *Colonial Penn*, 943 F.2d at 334; *McClatchy Newspapers*, 686 F.2d at 733; *Washington-Baltimore Newspaper Guild*, 442 F.2d at 1238. Because Arbitrator Kasher's power ended with the rendering of the award, and because all parties did not consent to the reopening of the arbitration award, the Union had no right to attempt to reopen the Kasher award. By doing that which the law prohibits, the Union acted outside the realm of its discretion. Any reasoning in support of the Union's conduct must be deemed irrational and a breach of the Union's duty of fair representation since the Union disregarded the mandates of the law. Summary judgment is therefore granted in favor of the plaintiffs with regard to the Union's attempt to reopen the arbitration award.

2. Damages

Plaintiffs must be compensated for the injuries that they sustained as a result of the Union's breach of its duty to fair representation. The Union's scheduling of hearings in front of Arbitrator Kasher caused the plaintiffs to ask this Court for a temporary restraining order and a preliminary injunction. This Court issued a temporary restraining order on August 8, 1991, enjoining any proceedings in front of Arbitrator Kasher. Hearings on plaintiffs' motion for a preliminary injunction began on August 22, 1991. On August 23, 1991, the Union announced that it would no longer be seeking to reopen the Kasher award. As a result, plaintiffs withdrew their motion for a preliminary injunction. Plaintiffs are entitled

to reasonable attorney fees and costs they incurred as a result of their efforts to enjoin the Union's improper attempt to reopen the December 8, 1990 arbitration decision.[7]

III. Conclusion

For the reasons set forth above, defendant's summary judgment motion is granted in part and denied in part, and plaintiffs' cross-motion for summary judgment is granted in part and denied in part. An appropriate order will be entered.

/s/ Stanley S. Brotman
STANLEY S. BROTMAN
UNITED STATES
DISTRICT JUDGE

DATED: 9/27/94

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[7] The Court has received plaintiffs' application for counsel fees and costs, and is awaiting defendant's response. This matter is being referred to Magistrate Judge Joel Rosen for a hearing to determine plaintiffs' damages, with a report and recommendation to the undersigned.

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DOROTHEA A. ARCURI, et. al., Plaintiffs, vs. TRUMP TAJ MAHAL ASSOCIATES, et. al., Defendants.	CIV. NO. 91-3529 (SSB) OPINION (Filed Aug. 1, 1995)

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BROTMAN, DISTRICT JUDGE.

I. Facts and Procedural Background

The factual and procedural history underlying this litigation has been set out at length in an earlier opinion issued by this court. *Arcuri v. Trump Taj Mahal Assoc.*, No. 91-3529 (D.N.J. September 27, 1994). Briefly, in the prior opinion, this court granted in part defendant Union's ("defendant") or "Union" or "Local 54") motion for summary judgment in that the court found that the Union did not breach its duty of fair representation with regard to the implementation of the arbitration award. Additionally, the court granted in part plaintiffs' motion for summary judgment finding that the Union breached its duty of fair representation to the plaintiffs' by attempting to reopen a final arbitration award. The court further determined that the plaintiffs were entitled to reasonable attorney's fees and costs as damages incurred by their efforts to enjoin the Union's attempt to reopen a final arbitration award. This court referred the determination of such damages to a magistrate judge, with a report and recommendation to be issued to this court. Presently before the court are the parties' objections to the Magistrate Judge's Report and Recommendation dated May 10, 1995.

II. Discussion

At the outset, the Union objects to the underlying adjudication that plaintiffs are entitled to recover their attorney's fees and costs. Defendant stresses that the cross-motions for summary judgment resolved by this court addressed only issues of liability. Thus, defendant

argues that the court, *sua sponte*, made a determination with regard to damages before either party had an opportunity to present argument and offer proof on the issue of damages. Consequently, defendant requests that this court reconsider its determination with regard to damages in light of the prevailing law.

Because the court's September 27, 1994 Opinion and Order did not constitute a final judgment, the court can reconsider and modify its decision at any time before its judgment is made final. *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1234 (D.N.J. 1989) (citing *John Simmons Co. v. Grier Brothers Co.*, 258 U.S. 82 (1922); *Fireman's Fund Ins. Co. v. Myers*, 439 F.2d 834, 838 (3d Cir. 1971); *United States v. Jerry*, 487 F.2d 600, 604 (3d Cir. 1973)). A party seeking reconsideration must show more than a disagreement with the court's decision. *See G-69 v. Degnan*, 748 F. Supp. 274, 275 (D.N.J. 1990); *Carteret Sav. Bank. F.A. v. Shushan*, 721 F. Supp. 705, 709 (D.N.J. 1989), *modified on other grounds*, 919 F.2d 225 (3d Cir. 1990); *Egloff v. New Jersey Air Nat'l Guard*, 684 F. Supp. 1275, 1279 (D.N.J. 1988). The only proper grounds for granting a motion for reconsideration is that overlooked facts or law, if considered by the court, "might reasonably have altered the result reached." *See New York Guardian Mortgage Corp. v. Cleland*, 473 F. Supp. 409, 420 (S.D.N.Y. 1979); *see also Egloff*, 684 F. Supp. at 1279. The defendant argues that the court's decision awarding attorney's fees as damages to plaintiffs contravenes established law.

Upon further review of the law, the court concedes that it erred in awarding to plaintiffs their attorney's fees as damages. Only in limited circumstances have courts permitted union members bringing breach of the duty of

fair representation claims to collect their attorney's fees as damages from the union. The Third Circuit has joined other courts in holding that a union member can recover as damages the cost of obtaining substitute representation in order to pursue a § 301 claim against the employer when the union has wrongfully refused to provide the union member with such legal representation. *Ames v. Westinghouse Elec. Corp.*, 864 F.2d 289, 293 (3d Cir. 1988) (and cases cited therein). The Third Circuit expressly noted that its finding is not to be used to suggest that "fee shifting as such would be appropriate" in a suit against the union. *Id.* By restricting the attorney's fees recoverable as damages to those a union member incurred in bringing his claim against the employer, the *Ames* Court implicitly denied recovery of attorney's fees incurred by the plaintiff in prosecuting his breach of the duty of fair representation claim against the union. *See id.* (and cases cited therein). As the circumstances in the instant matter are quite distinguishable from those in *Ames*, i.e., the plaintiffs have not prevailed on any claim against their employer which the Union had refused to bring on their behalf, plaintiffs cannot recover their attorney's fees under this theory. Consequently, the court will withdraw that portion of its September 27, 1994 Opinion which awards to plaintiffs their attorney's fees as damages. This determination renders moot the Magistrate Judge's Report and Recommendation dated May 10, 1995.[1]

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[1] The court notes that a more appropriate time to bring this issue to the attention of the court would have been after this court entered its September 27, 1994 Opinion and prior to any argument before the Magistrate Judge.

However, the parties having raised additional grounds upon which the court could rely in awarding plaintiffs their attorney's fees, the court will now determine whether any of these additional grounds support an award of attorney's fees in this matter. Under the American Rule, it has been firmly established that attorney's fees "are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters and Joiners of Am.*, 456 U.S. 717, 102 S. Ct. 2112, 2114 (1982) (quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717, 87 S. Ct. 1404, 1407 (1967)); *see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 95 S. Ct. 1612, 1621 (1975). In the absence of a statute or contract authorizing the awarding of attorney's fees, however, federal courts may exercise their equitable powers to award attorney's fees in circumstances where the interests of justice so require. *Hall v. Cole*, 412 U.S. 1, 93 S. Ct. 1943, 1946 (1973). Utilizing their equitable powers, courts have carved out a number of exceptions to the American Rule, including the bad faith exception, willful disobedience of a court order, creation of a common fund and obtaining a common benefit. *Summit Valley Indus.*, 102 S. Ct. at 2114-15; *Alyeska Pipeline*, 95 S. Ct. at 1621-24; *Hall*, 93 S. Ct. at 1946-47.

There exists no federal statute which provides for an award of attorney's fees to a prevailing plaintiff in a breach of the duty of fair representation case brought against a union. *See Ames*, 864 F.2d at 293 (no federal statute provides for fee shifting in a hybrid section 301 case); *Hardesty v. Essex Group, Inc.*, 550 F. Supp. 752, 767 (N.D. Ind. 1982) (no statute authorizes fee shifting in a

breach of duty of fair representation case). The first three of the enumerated exceptions clearly do not apply in the present matter.[2] Application of the last exception, the common benefit exception, however, warrants further consideration by this court.

The United States Supreme Court has determined that an award of attorney's fees is warranted under the common benefit exception "in cases where the litigation has conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S. Ct. 616, 626 (1970); *Hall*, 93 S. Ct. at 1946-1948. The Supreme Court justified its determination by reasoning that "[t]o allow others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Mills*, 90 S. Ct. at 625. In *Mills*, the Court awarded attorney's fees to shareholder plaintiffs who succeeded in setting aside a corporate merger which had been achieved through use of a misleading proxy statement in violation of § 14(a) of the Securities Exchange Act of 1934. Reasoning that the distribution of misleading proxy materials jeopardized important rights of the corporation and all its shareholders, the Court

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[2] The court has made no finding attributing bad faith to either the Union or Monitor Flanagan. Defendant Union has not willfully disobeyed any court order. Furthermore, the present lawsuit has not yielded any fund for the benefit of all union members.

concluded that plaintiff's success in setting aside the merger was therapeutic to the corporation and "rendered a substantial service to the corporation and its shareholders." *Id.* at 627-28. The Court determined that the adjudication provided a benefit to all shareholders and concluded that "[t]o award attorney's fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit." *Id.* at 628.

The common benefit exception to the American Rule has also been utilized to award attorney's fees in lawsuits brought by union members against their union. In *Hall v. Cole*, the Supreme Court awarded attorney's fees under the common benefit exception in a suit brought by a union member, pursuant to § 102 of the Labor-Management Reporting and Disclosure Act ("LMRDA"), after the union member was expelled from the union for having voiced disapproval of certain actions and policies perpetuated by union officers. The Court explained that:

> there can be no doubt that, by vindicating his own right of free speech guaranteed by § 101(a)(2) of Title I of the LMRDA, respondent necessarily rendered a substantial service to his union as an institution and to all of its members. When a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened. And, by vindicating his own right, the successful litigant dispels the "chill" cast upon the rights of others. Indeed, to the extent that such lawsuits contribute to the preservation of

> union democracy, they frequently prove beneficial "not only in the immediate impact of the results achieved but in their implications for the future conduct of the union's affairs." Yablonski v. United Mine Workers of America, 150 U.S.App.D.C. 253, 260, 466 F.2d 424, 431 (1972).

Hall, 93 S. Ct. at 1948. Similar reasoning has been used by other courts, including the Third Circuit Court of Appeals, to award attorney's fees to union members who have challenged union conduct under the LMRDA. *Brennan v. United Steelworkers of Am.*, 554 F.2d 586, 599-608 (3d Cir. 1977) (union member who intervened in suit brought by Secretary of Labor for violation of election provisions of LMRDA was entitled to recover his attorney's fees from the entire union even though the election in question covered only one district comprising 9 percent of union membership), *cert. denied*, 453 U.S. 977 (1978), *aff'd in part and rev'd in part by Marshall v. United Steelworkers of Am*, 666 F.2d 845, 853 (3d Cir. 1981) (same), *cert. denied*, 459 U.S. 823 (1982); *Rodonich v. Senyshyn*, 52 F.3d 28, 32-35 (2d Cir. 1995) (whether district court should award attorney's fees to union member who prevailed in suit based on violations of freedom of speech rights under LMRDA and recovered monetary damages depends on analysis of the factual circumstances, including any benefit derived by union's membership; intangible and indirect benefits may nevertheless be substantial to union members); *Usery v. Local Union No. 639 Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am.*, 543 F.2d 369, 381-83 (D.C. Cir. 1976) (district court may apply the common benefit exception to a LMRDA plaintiff and permit fee-shifting against the union), *cert. denied*, 429 U.S. 1123

(1977); *cf. Guidry v. International Union of Operating Engineers*, 882 F.2d 929, 944 (5th Cir. 1989) (LMRDA plaintiff who received monetary award cannot recover attorney's fees because other union members could not have initiated the suit and because plaintiff received substantially greater benefit as a result of the damage award), *vacated on other grounds*, 494 U.S. 1022 (1990); *Shimman v. International Union of Operating Engineers*, 744 F.2d 1226, 1234-36 (6th Cir. 1984) (same), *cert. denied*, 469 U.S. 1215 (1985).

Some courts have additionally allowed the recovery of attorney's fees under the common benefit exception to union members prevailing in their breach of the duty of fair representation claims. *Emmanuel v. Omaha Carpenters Dist. Counsel*, 560 F.2d 382, 385-86 (8th Cir. 1977) (plaintiff entitled to award of attorney's fees because "[a]lthough [his] lawsuit was aimed primarily at vindicating his own right, there can be little doubt that he rendered a substantial service to the Union and persons it represents by protecting a member's right to be hired directly by an employer or through a specific request to the Union"); *Harrison v. United Transp. Union*, 530 F.2d 558, 564 (4th Cir. 1975) (fee-shifting is appropriate where plaintiff's suit vindicates a right shared by all union members, the right of fair representation of each member's claim against the employer), *cert. denied*, 425 U.S. 958 (1976); *Bygott v. Leaseway Transp. Corp.*, 637 F. Supp. 1433, 1440-41 (E.D. Pa. 1986) (plaintiffs entitled to receive attorney's fees because "[p]laintiffs' success against the union for its arbitrary and perfunctory investigation and consideration of plaintiffs' grievance has benefited, and will continue to benefit, each union member"). The *Emmanuel*, *Harrison* and

Bygott courts concluded that a union member who prevails on a breach of the duty of fair representation claim against a union vindicates and protects a right common to all union members and thus confers a common benefit on each member of the union. *Emmanuel*, 560 F.2d at 385; *Harrison*, 530 F.2d at 564; *Bygott*, 637 F. Supp. at 1440-41; *cf. Aguinaga v. United Food and Commercial Workers Int'l Union*, 993 F.2d 1480, 1482-85 (10th Cir. 1993) (because union membership did not share in plaintiffs' money judgment and because plaintiffs did "not [show] that they necessarily benefited from whatever positive effect the judgment may have on the Union's future treatment of its members," the commonality requirement of the common benefit exception was not met); *Rogers v. Air Line Pilots Ass'n Int'l*, 988 F.2d 607, 616 (5th Cir. 1993) (plaintiffs who prevailed in their suit for breach of duty of fair representation due to union's failure to enforce an arbitration award were not entitled to fees because no common benefit was conferred on union membership).

The matter presently before the court presents an issue of first impression in that this court is unaware of another case where a court has considered the merits of applying the common benefit exception to a breach of the duty of fair representation claim alleging that the union breached its duty by attempting to unilaterally reopen a final arbitration award. After careful consideration, the court concludes that the present matter is significantly analogous to other labor union cases in which courts have deemed an award of attorney's fees to be just and equitable.

In the instant matter, plaintiffs satisfy both the commonality and apportionment requirements of the

common benefit exception. The Union argues that this court's ruling finding that the Union breached its duty of fair representation by attempting to reopen the arbitration award provides "no general vindication of members' rights because there is no generalized lesson that the Union could or should learn from the judgment against it that would benefit other Union members in the future." Local 54's Memorandum of Law in Support of its Objections to the Magistrate's Report and Recommendation Dated May 10, 1995, at 12. As the import of the court's earlier opinion seems to have escaped the Union, the court will reiterate the "generalized lesson" that the Union should derive from this opinion.

> As a general rule, once an arbitration panel renders a decision regarding the issues submitted, it becomes *functus officio* and lacks any power to reexamine that decision.
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> . . . . Accordingly, . . . absent the mutual consent of the parties, an arbitrator may not interpret, impeach or explain a final arbitration award. Even the availability of new evidence or witnesses whose testimony would directly contradict the findings of the arbitrator on central issues does not make it appropriate for the arbitrator to reconsider his original determination of the issues.
>
> . . . . [T]he Union acted improperly and arbitrarily when it attempted to reopen the arbitration award.. . . . Because Arbitrator Kasher's power ended with the rendering of the award, and because all parties did not consent to the reopening of the arbitration award, the Union had no right to attempt to reopen the Kasher award. By doing that which the law prohibits,

> the Union acted outside the realm of its discretion.

Opinion dated September 27, 1994 at 13-16 (citations omitted). Furthermore, the Union's attempt to reopen the award was solely for purposes of dispelling a disagreement between two factions of union members. Notably, however, the initial arbitration was conducted to resolve a dispute between the employer and the Union, which represented the plaintiffs at the arbitration. The purpose of the initial arbitration was never to address any internal dispute between union members, which would have constituted the primary purpose of the subsequent arbitration had the Union succeeded in its attempt to reopen. Resolving disagreements between divergent positions of different groups of union members was the province of the Union. In fact the Union properly executed its obligation, at a later time, by holding hearings to determine whether the earlier arbitration had been tainted by fraud and perjury. A unilateral attempt to vacate or question the arbitration decision would only be warranted after a finding by the Union that the arbitration had been tainted by fraud and/or perjury. The "generalized lesson" that the Union should extract from this adjudication is that, absent the mutual consent of the parties involved in the arbitration, an arbitrator may not reconsider the merits of a final arbitration award. Thus, absent such consent, the Union is prohibited from unilaterally attempting to reopen a final arbitration award.[3]

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[3] A letter sent to the court by Union counsel, dated July 24, 1995, seems to agree with the court's rendition of the law. On page 4 of this letter, counsel states that "[s]ince it is well settled

Additionally, the Union contends that, at best, approximately 24 out of 15,000 union members received a benefit from the plaintiffs' success in this litigation. Local 54's Memorandum of Law in Support of its Objections to the Magistrate's Report and Recommendation Dated May 10, 1995, at 15. Thus, the Union argues that Local 54 derived no common benefit from plaintiffs' success because any benefit obtained by the union membership was far less than the concrete benefit the plaintiffs claim to have received by virtue of an increase in their seniority levels.[4] *Id.* However, the Third Circuit in *Brennan* rejected a similar argument voiced by a union. The Court stressed that "[t]he mere fact that [plaintiff] himself benefited [the most] from his prosecution of this action neither negates

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that the arbitration process belongs to the parties to the collective bargaining agreement – the union and the employer – and not to the individual employees, an attempt by the parties to the agreement to have an arbitration award reopened, reviewed or clarified stands in very different circumstances than when one party to the agreement, the employer or the union, seeks to unilaterally reopen an award . . . " Counsel's legal position is consistent with the court's determination of the law set out in the September 27, 1994 Opinion. Where the court and counsel seem to disagree is on a factual issue. That is, counsel seems to disregard the court's factual finding that one party to the arbitration, the employer, did not consent to the reopening of the Kasher award. *See* Opinion dated September 27, 1994 at 14-16.

[4] The Union cited two cases from other circuits, *Aguinaga v. United Food and Commercial Workers*, 993 F.2d 1480 (10th Cir. 1993) and *Shimman v. International Union of Operating Engineers*, 744 F.2d 1226 (6th Cir. 1984), in support of this contention. This court believes that the jurisprudence adhered to in this Circuit, as described *infra*, supports a result different from that reached by the *Aguinaga* and *Shimman* courts.